

BIENNIAL REPORT  
of the  
**ATTORNEY GENERAL**  
**STATE OF FLORIDA**

From January 1, 1943, to December 31, 1944

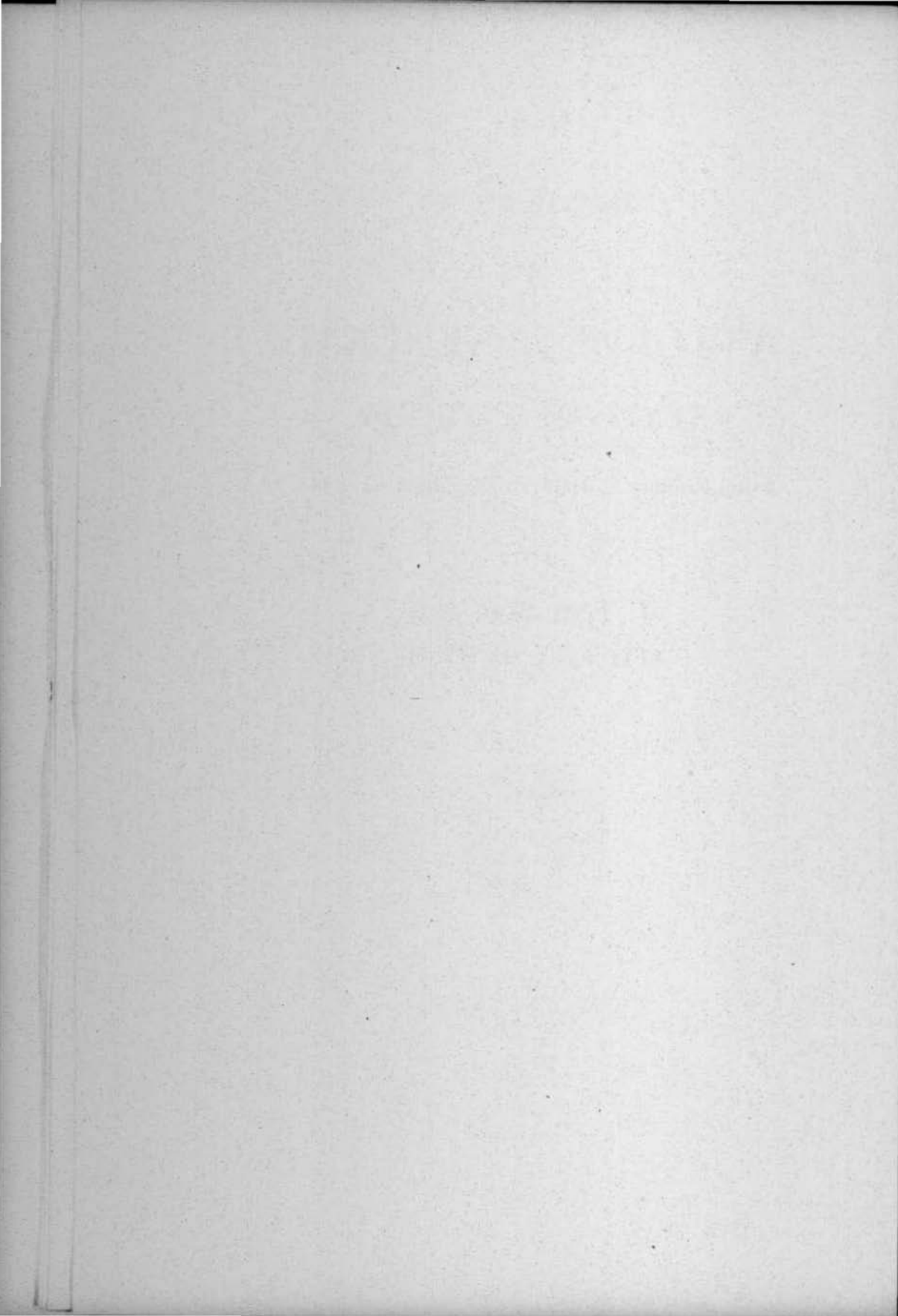
**J. TOM WATSON**  
**ATTORNEY GENERAL**



Tallahassee, Florida

1944

36734





# TABLE OF CONTENTS

## Part One

	Page
LETTER OF TRANSMITTAL.....	1
THE OFFICE OF ATTORNEY GENERAL IN FLORIDA.....	2
COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE.....	7
EXTRADITION STATISTICS.....	8
APPROPRIATIONS AND EXPENDITURES.....	9
FORMER ATTORNEYS GENERAL OF FLORIDA.....	10
STATE LAW DEPARTMENT.....	11
JUDICIAL DEPARTMENT OF FLORIDA.....	13
Justices of the Supreme Court.....	13
Clerk, Supreme Court.....	13
Attorney General.....	13
Attorney for Railroad Commission.....	13
Attorney for State Road Department.....	13
Judges, Circuit Court.....	14
Judge, Court of Record.....	14
Judges, Criminal Court of Record.....	14
Judge, Court of Crimes.....	14
Judges, Civil Court of Record.....	15
Judges, Juvenile Court.....	15
State Attorneys.....	15
Assistant State Attorneys.....	15
County Solicitors.....	16
Assistant County Solicitors.....	16
County Prosecuting Attorneys.....	16
REPORTS OF STATE ATTORNEYS.....	17
First Circuit.....	17
Second Circuit.....	19
Third Circuit.....	23
Fourth Circuit.....	27
Fifth Circuit.....	28
Sixth Circuit.....	31
Seventh Circuit.....	33
Eighth Circuit.....	36
Ninth Circuit.....	40
Tenth Circuit.....	43
Eleventh Circuit.....	45
Twelfth Circuit.....	46

Thirteenth Circuit .....	50
Fourteenth Circuit .....	51
Fifteenth Circuit .....	54
REPORTS OF COUNTY SOLICITORS .....	56
Dade County .....	56
Duval County .....	57
Escambia County .....	58
Hillsborough County .....	58
Monroe County .....	60
Orange County .....	61
Palm Beach County .....	62
Polk County .....	63
REPORTS OF CLERKS OF CIRCUIT COURTS .....	66. 67
REPORT OF CLERK OF CIVIL COURT OF RECORD, DADE COUNTY .....	68
REPORT OF CLERK OF CIVIL COURT OF RECORD, DUVAL COUNTY .....	68
REPORT OF CLERK OF COURT OF RECORD, ESCAMBIA COUNTY .....	68
BOARDS, COMMISSIONS AND BUREAUS OF THE STATE OF FLORIDA .....	69

## Part Two

	Page
TABLE OF CONTENTS .....	85
OPINIONS OF ATTORNEY GENERAL .....	91
INDEX .....	515

# LETTER OF TRANSMITTAL

## STATE OF FLORIDA

### ATTORNEY GENERAL'S OFFICE

Tallahassee, Florida, January 1, 1945.

*To His Excellency, Honorable Millard Caldwell,  
Governor of Florida:*

SIR:

In compliance with Article IV, Section 27, Florida Constitution, directing that each officer of the executive department make full report of his official acts, of the receipts and expenditures of his office, and the requirements of the same, to the Governor at the beginning of each regular session of the Legislature, or whenever the Governor shall require it, I have the honor to submit herewith the Biennial Report of my office covering the two calendar years immediately preceding the 1945 regular session of the Legislature, being the period from January 1, 1943 to December 31, 1944, inclusive.

In making this report, I submit the legal opinions rendered in writing by me during such period, except those which are repetitions or are of such casual character as not to be of general interest. The excepted opinions are of record in this office, indexed so as to be available to the public upon request.

In reporting the receipts and expenditures in my office for the biennium, I submit an itemized statement of my appropriations and expenditures.

In making report of the requirements of my office, I submit a statement giving the general scope of my duties, along with a list of the departments, commissions and boards for whom I act as attorney and legal advisor and those for whom I construe the law to require the rendition of such service when called upon.

As a part of this report, I have taken the liberty of listing the personnel of my office, the membership of the Supreme Court of the State, the names and circuits of the Circuit Judges of the State, the names of the Judges of the Court of Record of Escambia County, the Criminal Courts of Record, the Court of Crimes of Dade County, the Civil Courts of Record and of the Juvenile Courts, the names and circuits of the State Attorneys and Assistant State Attorneys of the State and the names and counties of the County Solicitors, Assistant County Solicitors, and County Prosecuting Attorneys. I am submitting reports obtained from the Circuit Clerks of the State, the Clerk of the Court of Record of Escambia County and the Clerks of the Civil Courts of Record of the cases handled in their courts and reports obtained from the State Attorneys and County Solicitors of the State showing the cases handled by the Criminal Courts of Record and the Court of Crimes of the State.

My personal report to you required under Section 16.05, Florida Statutes, 1941, is not included herein but is delivered to you under separate cover.

Respectfully submitted,

J. TOM WATSON,  
Attorney General.

## THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The Attorney General of Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: first, the common law; second, the Constitution of Florida; third, the statutory law of Florida.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

### COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the Supreme Court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the State, all suits or prosecutions, civil or criminal, or in equity, in which the State may be a party, or in anywise interested, in the Supreme Court of this State. At common law his office is in many respects judicial in character and he is clothed with a considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power. It is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect states property and revenue; to represent the State in all criminal cases before the appellate court; to revoke and annul grants made by the State improperly or when forfeited by the grantee; to determine the right of any one who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

### CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

### STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the Attorney General has the following general and regular statutory powers, duties and authority, to:

1. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the Court thereon, to the Governor, five days before the first day of every session of the legislature (\$16.05).\*

2. Recommend, at the convening of every session of the legislature, a person experienced in indexing to supervise and assist the indexing clerks

\*Reference is to Florida Statutes, 1941.

of each House in making the index for both journals and to prepare the journals in bound form (§16.04).

3. Prepare marginal abstracts to the several sections of the statutory law and a general alphabetical index to the general acts of each session of the legislature (§16.03).

4. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

5. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the Governor, Secretary of State, Treasurer, Comptroller or Superintendent of Public Instruction (§16.01 and §22, Art. IV, Fla. Const.).

6. Appear in and attend to suits or prosecutions in any of the courts of the State or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

7. Exercise general superintendence and direction over the several State Attorneys (§16.08).

8. Report the decisions of the Supreme Court, have them prepared in printed volumes and keep one copy of each in his office (§§25.29, 25.30).

9. Prepare and cause to be printed copies of fee bills of the various officers of the several counties of the State and to send copies of same to such county officials (§58.07).

10. Approve the bond of the Comptroller (§17.01).

11. Prosecute combinations against Florida meats (§544.02).

12. Investigate and rectify commercial discriminations (§§540.02-540.05).

13. Enjoin violations of the laws regulating commercial foodstuffs (§580.19).

14. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the Adjutant General's office for military purposes (§§73.22, 250.48).

15. Approve articles of incorporation for co-operative marketing associations (§618.04).

16. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

17. Enforce the anti-trust laws of the State (§542.03).

18. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

19. Approve title to real estate in which the State is interested (§135.16).

20. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

21. Represent the State in disbarment proceedings in the Supreme Court (§39.28).

22. Pass upon and approve regulations of district drainage boards (§298.53).



23. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

24. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

25. Conduct quo warranto proceedings (§§80.03, 875.19).

26. Act as attorney for the Railroad Commission (this work is negligible because of the fact that the Railroad Commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.62, 350.66).

27. Attend to all legal business arising in connection with the laws governing the salt water fishing industry (§373.22).

28. Prepare contracts for purchase of uniform school books (§233.16).

29. Pass upon legality of and give approval to all investments of school district sinking funds in purchases of bonds (§236.55).

30. Devise and furnish a form of seal for all the courts of the State (§26.48).

31. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

32. Give special attention to legal proceedings in connection with the sponge fishing industry (§373.22).

33. Conduct suits on bonds of State Health Officer (§381.10).

34. Act as legal advisor and attorney for the State Plant Board (§581.02).

35. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§341.17).

36. Sue to recover fines for doing business without a license (§625.17).

37. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

38. Assist in fixing values of securities deposited with the State Treasurer by trust companies under the Trust Law (§655.10).

39. Enforce the vital statistics law (§382.37).

40. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).

41. Act as attorney for the Parole Commission (§947.11).

42. Act as ex-officio member and legal advisor of the State Defense Council (§249.03).

43. Conduct extradition hearings for the Governor (§941.04).

44. Participate with other states in preserving the constitutional integrity of the State (§16.52).

45. Represent the State Treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§§69.04, 69.06).

46. Devise a suitable seal for the supervisors of registration (§98.51).

47. Represent the Insurance Commissioner in connection with insurance matters (§§637.54, 640.13).
48. Represent the State in proceedings to suspend or revoke licenses of labor union business agents (§481.10).
49. Represent the State in proceedings under the declaratory judgments law where the constitutionality of statutes is involved (§87.10).
50. Assist in the enforcement of the basic science law (§456.22).
51. Assist in the collection and enforcement of chain store license taxes (§204.13).
52. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).
53. Bring proceedings to test the validity of the incorporation of co-operative marketing associations and nonprofit co-operative associations (§§618.23, 619.09).
54. Bring proceedings to recover escheated property (§731.33).
55. Bring proceedings to forfeit prize money in lotteries (§849.12).
56. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).
57. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).
58. Assist in the enforcement of laws regulating the practice of optometry (§463.19).
59. Approve the form for bonds of nonresident outdoor advertisers (§479.06).
60. Represent the Commissioner of Agriculture in connection with the enforcement of the pure seed labeling law (§578.15).
61. Assist in the enforcement of the laws regulating small loan businesses (§516.23).
62. Bring proceedings to enforce compliance with orders of the Insurance Commissioner in connection with the Workmen's Compensation law (§440.38).
63. Direct and be in charge of the Statutory Revision Department (§16.43).

The Attorney General is a member of the following State Boards, Commissions and Councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).
2. State Board of Education (Fla. Const. §3, Art. XII).
3. Trustees of Internal Improvement Fund (§253.02, Florida Statutes, 1941).
4. State Board of Drainage Commissions (§298.69, Florida Statutes, 1941).
5. State Budget Commission (§216.01, Florida Statutes, 1941).
6. State Board of Conservation (§373.01, Florida Statutes, 1941).
7. State Board of Pardons (Fla. Const. §12, Art. IV).

8. State Canvassing Board (§99.49, Florida Statutes, 1941).
9. Florida Securities Commission (§517.03, Florida Statutes, 1941).
10. Railroad, etc., Assessment Board (§195.01, Florida Statutes, 1941).
11. Board of fixing values of investment securities of trust companies (§655.10, Florida Statutes, 1941).
12. Board for Supervision and Regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes, 1941).
13. State Housing Board (§424.04, Florida Statutes, 1941).
14. Florida Economic Advancement Council (§120.01, 1943 Supplement, Florida Statutes, 1941).
15. Department of Public Safety Executive Board (§321.01, Florida Statutes, 1941).
16. State Board for Vocational Education (§229.08, Florida Statutes, 1941).
17. Board of Trustees of the Teachers' Retirement System (§238.03, Florida Statutes, 1941).
18. State Text Book Purchasing Board (§233.13, Florida Statutes, 1941).
19. Ex-officio member of Florida State Defense Council (§249.03, Florida Statutes, 1941).
20. Governor's Cabinet (Fla. Const. §20, Art. IV).



## COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE FROM JANUARY 1, 1943 THROUGH DECEMBER 31, 1944.

### CIVIL CASES

Number of cases pending January 1, 1943.....		325
Number of cases docketed between January 1, 1943, and December 31, 1944, inclusive,		
Docketed and still pending.....	286	
Docketed and closed.....	193	479
		<hr/>
		804
Number of cases disposed of between January 1, 1943, and December 31, 1944, inclusive,		
Pending January 1, 1943, closed.....	109	
Docketed and closed.....	193	302
		<hr/>
Number of cases pending January 1, 1945.....		502

### CRIMINAL CASES

Number of cases pending January 1, 1943.....		102
Number of cases docketed between January 1, 1943, and December 31, 1944, inclusive,		
Docketed and still pending.....	86	
Docketed and closed.....	170	256
		<hr/>
		358
Number of cases disposed of between January 1, 1943, and December 31, 1944, inclusive,		
Pending January 1, 1943, closed.....	102	
Docketed and closed.....	170	272
		<hr/>
Number of cases pending January 1, 1945.....		86

### TOTAL CASES

Total civil and criminal cases pending or docketed during biennium ending December 31, 1944.....		1,162
Total civil and criminal cases closed or disposed of during biennium ending December 31, 1944.....		574
		<hr/>
Total civil and criminal cases pending January 1, 1945.....		588

## EXTRADITION STATISTICS

### REQUISITIONS ON FLORIDA

During the years 1943 and 1944 the following states made requisitions on the State of Florida for fugitives from justice as indicated:

Alabama	30	New York	10
California	3	North Carolina	14
Colorado	1	Ohio	6
Georgia	44	Oklahoma	1
Illinois	6	Pennsylvania	2
Indiana	4	South Carolina	13
Maryland	2	Tennessee	3
Massachusetts	3	Virginia	10
Michigan	1	West Virginia	1
Minnesota	2	Wisconsin	3
Missouri	1	Wyoming	1
New Jersey	6		
Total			167

### REQUISITIONS BY FLORIDA

During the years 1943 and 1944 the State of Florida made requisitions on the following states and District of Columbia for fugitives from justice as indicated:

Alabama	18	Minnesota	1
Arkansas	1	Missouri	3
California	4	New Jersey	7
Connecticut	1	New York	17
Delaware	1	Ohio	7
District of Columbia	3	Oklahoma	1
Georgia	17	Oregon	1
Illinois	3	Pennsylvania	7
Indiana	5	South Carolina	1
Kansas	1	Tennessee	3
Kentucky	2	Texas	1
Louisiana	6	Virginia	5
Maryland	4	Washington	2
Massachusetts	1	West Virginia	2
Michigan	4		
Total			129

# **APPROPRIATIONS AND EXPENDITURES ATTORNEY GENERAL**

## **Including Statutory Revision Department**

### **APPROPRIATIONS \***

#### **SALARY FUNDS**

Balance January 1, 1943	\$ 62,018.41
Appropriations July 1, 1943 to June 30, 1945 (Biennium)	221,160.00
(Attorney General \$75,600.00; Statute Revision \$19,980.00; Chapter 22,048 \$15,000.00 per year)	
Total	\$283,178.41

### **EXPENDITURES**

#### **SALARY FUNDS**

January 1, 1943 to June 30, 1943	\$ 58,711.99
Amount Reverted July 1, 1943	3,306.42
July 1, 1943 to December 31, 1944	158,859.93
Total	\$220,878.34
Balance January 1, 1945	\$ 62,300.07

### **APPROPRIATIONS \***

#### **NECESSARY AND REGULAR FUNDS**

Balance January 1, 1943	\$ 5,246.55
Appropriations July 1, 1943 to June 30, 1945 (Biennium)	33,840.00
(Attorney General \$14,400.00; Statute Revision \$2,520.00 per year).	
Total	\$ 39,086.55

### **EXPENDITURES**

#### **NECESSARY AND REGULAR FUNDS**

January 1, 1943 to June 30, 1943	\$ 5,226.27
Amount Reverted July 1, 1943	20.28
July 1, 1943 to December 31, 1944	19,481.17
Total	\$ 24,727.72
Balance January 1, 1945	\$ 14,358.83

\* From Chapter 22,071, Acts 1943, unless otherwise indicated.

## ATTORNEYS GENERAL OF FLORIDA

### Since 1845

JOSEPH BRANCH.....	1845-1846
AUGUSTUS E. MAXWELL.....	1848-1848
JAMES T. ARCHER.....	1848-1848
DAVID P. HOGUE.....	1848-1853
MARIANO D. PAPY.....	1853-1860
JOHN B. GALBRAITH.....	1860-1868
JAMES D. WESTCOTT, JR.....	1868-1868
A. R. MEEK.....	1868-1870
SHERMAN CONANT.....	1870-1870
J. P. C. DREW.....	1870-1872
H. BISSBEE, JR.....	1872-1872
J. P. C. EMMONS.....	1872-1873
WILLIAM A. COCKE.....	1873-1877
GEORGE P. RANEY.....	1877-1885
C. M. COOPER.....	1885-1889
WILLIAM B. LAMAR.....	1889-1903
JAMES B. WHITFIELD.....	1903-1904
W. H. ELLIS.....	1904-1909
PARK TRAMMELL.....	1909-1913
THOMAS F. WEST.....	1913-1917
VAN C. SWEARINGEN.....	1917-1921
RIVERS BUFORD.....	1921-1925
J. B. JOHNSON.....	1925-1927
FRED H. DAVIS.....	1927-1931
CARY D. LANDIS.....	1931-1938
GEORGE COUPER GIBBS.....	1938-1941
J. TOM WATSON.....	1941-

## STATE LAW DEPARTMENT

## ATTORNEY GENERAL

J. TOM WATSON

## ASSISTANT ATTORNEYS GENERAL

D. STUART GILLIS.....	January, 1941-March, 1943
L. A. TRUETT.....	September, 1937-May, 1944
M. B. CONKLIN.....	January, 1941-December, 1943
L. W. PETTEWAY.....	January, 1941-February, 1944
J. R. BULLOCK.....	March, 1942-December, 1943
JAMES H. MILLICAN.....	November, 1942-July, 1944
W. L. FREELAND.....	May, 1943-September, 1943
WOODROW M. MELVIN.....	November, 1940-November, 1944
D. B. WHITAKER.....	January, 1941-February, 1943
JAMES B. TONEY.....	January, 1941-
FRED M. BURNS.....	August, 1939-
GEORGE M. POWELL.....	February, 1943-
JOHN C. WYNN.....	October, 1941-
LAMAR WARREN.....	July, 1943-
R. W. ERVIN, JR.....	July, 1943-
FRANK J. HEINTZ.....	April, 1944-
HOWARD S. BAILEY.....	March, 1944-
D. FRED McMULLEN.....	May, 1944-

## SPECIAL ASSISTANT ATTORNEYS GENERAL

C. H. B. FLOYD (Promoted to Assistant Attorney General, December, 1944).....	November, 1942-
CECIL T. FARRINGTON.....	September, 1944-
H. T. BLACK.....	July, 1941-February, 1943

## LAW EDITORS

GEORGE N. MACDONNELL.....	November, 1943-November, 1944
J. W. MELVIN.....	October, 1943-

## LIBRARIAN AND ASSISTANT REPORTER

T. L. KARN.....	February, 1941-
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## SECRETARIES

H. C. POMEROY.....	September, 1941-
HELEN ROUNTREE.....	April, 1942-November, 1943
BESSIE MARTIN.....	September, 1939-September, 1943
VIRGINIA HAMMOND.....	March, 1941-
HARRIETT ROEBUCK.....	July, 1935-March, 1943
LUCILLE HAM.....	January, 1941-
MARTHA BANNERMAN.....	September, 1941-February, 1944
MARION DAVIDSON.....	February, 1942-March, 1943
HAZEL SANDERSON.....	August, 1939-May, 1944
VERA ZIMMERMAN.....	August, 1941-
ROSA STANALAND.....	April, 1941-December, 1943
EVELYN DAVIS.....	July, 1929-
KATHRON HIGHTOWER.....	June, 1941-July, 1944
MARY VALLANCE.....	November, 1942-
IRENE A. SMITH.....	April, 1943-
KAY JOHNSTON WIGHT.....	May, 1943-August, 1944
GLORIA ARANGO SELPH.....	February, 1941-
ETHEL BILLINGSLEY DAVIS.....	March, 1944-
LILLIAN HENRY.....	May, 1944-
CAROLINE DEDGE.....	July, 1944-
VIVIAN C. GORDY.....	July, 1944-
LORENE H. WILSON.....	September, 1944-
JEWELL ROBERTS.....	January, 1944-

## STENOGRAPHER-CLERKS

RUTH PAYNE BOMFORD.....	June, 1942-
MILDRED BEVILLE.....	March, 1944-September, 1944
INEZ ALDERMAN.....	May, 1944-
MARY L. McDONALD.....	August, 1944-
MARY S. McDAVID.....	August, 1944-

## RECEPTIONISTS AND TELEPHONE OPERATORS

MARY A. ELLIS.....	June, 1943-January, 1944
JOHN HORNE.....	July, 1937-May, 1944
ELSIE G. WOOLWINE.....	January, 1944-March, 1944
HELEN C. KENNEDY.....	May, 1944-

## FILING SECRETARIES

MARGARET R. HALL.....	August, 1941-
MARGARET E. GANNON (and Bookkeeper).....	April, 1929-

## JUDICIAL DEPARTMENT OF FLORIDA

### Supreme Court Justices

TALLAHASSEE, FLORIDA

#### 1943-1944 TERMS

##### Chief Justice

Hon. RIVERS BUFORD.

##### DIVISION A

Hon. GLENN TERRELL.

Hon. R. H. CHAPMAN.

Hon. ALTO ADAMS.

##### DIVISION B

Hon. ARMSTEAD BROWN.

Hon. ELWYN THOMAS.

Hon. H. L. SEBRING.

#### 1945-1946 TERMS

##### Chief Justice

Hon. R. H. CHAPMAN.

##### DIVISION A

Hon. GLENN TERRELL.

Hon. RIVERS BUFORD.

Hon. ALTO ADAMS.

##### DIVISION B

Hon. ARMSTEAD BROWN.

Hon. ELWYN THOMAS.

Hon. H. L. SEBRING.

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Hon. GUYTE P. McCORD, Clerk Supreme Court.

Hon. J. TOM WATSON, Attorney General.

Hon. LEWIS W. PETTEWAY, Attorney for State Railroad Commission

Hon. T. M. SHACKLEFORD, Attorney for State Road Department.

## JUDGES OF THE CIRCUIT COURTS

FIRST CIRCUIT.....	Hon. L. L. FABISINSKI
	Hon. R. A. McGEACHY
SECOND CIRCUIT.....	Hon. E. C. LOVE
	Hon. W. MAY WALKER
THIRD CIRCUIT.....	Hon. HAL W. ADAMS
	Hon. R. H. ROWE
FOURTH CIRCUIT.....	Hon. DeWITT T. GRAY
	Hon. BAYARD B. SHEILDS
	Hon. A. D. McNEILL
DUVAL CIRCUIT.....	Hon. MILES W. LEWIS
FIFTH CIRCUIT.....	Hon. J. C. B. KOONCE
	Hon. F. R. HOCKER
SIXTH CIRCUIT.....	Hon. JOHN U. BIRD
	Hon. T. FRANK HOBSON
SEVENTH CIRCUIT.....	Hon. GEO. WM. JACKSON
	Hon. HERBERT B. FREDERICK*
EIGHTH CIRCUIT.....	Hon. A. Z. ADKINS
	Hon. JOHN A. H. MURPHREE
NINTH CIRCUIT.....	Hon. FRANK A. SMITH
	Hon. M. B. SMITH
	Hon. A. O. KANNER
TENTH CIRCUIT.....	Hon. H. C. PETTEWAY
	Hon. D. O. ROGERS
ELEVENTH CIRCUIT.....	Hon. PAUL D. BARNES
	Hon. ROSS WILLIAMS
	Hon. RICHARD H. HUNT*
	Hon. GEORGE E. HOLT
	Hon. MARSHALL C. WISEHEART
	Hon. JOSEPH OTTO
TWELFTH CIRCUIT.....	Hon. GEORGE W. WHITEHURST
	Hon. W. T. HARRISON
THIRTEENTH CIRCUIT.....	Hon. L. L. PARKS
	Hon. HARRY N. SANDLER
FOURTEENTH CIRCUIT.....	Hon. IRA A. HUTCHISON
	Hon. E. C. WELCH
FIFTEENTH CIRCUIT.....	Hon. C. E. CHILLINGWORTH*
	Hon. GEO. W. TEDDER
	Hon. JOSEPH S. WHITE

\*On military leave.

## JUDGE OF THE COURT OF RECORD

ESCAMBIA COUNTY.....	Hon. ERNEST E. MASON
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## JUDGES OF THE CRIMINAL COURTS OF RECORD

DADE COUNTY.....	Hon. BEN C. WILLARD
DUVAL COUNTY.....	Hon. BRYAN SIMPSON*
	Hon. MABRY A. CARLTON**
HILLSBOROUGH COUNTY.....	Hon. JOHN R. HIMES
MONROE COUNTY.....	Hon. THOMAS S. CARO
ORANGE COUNTY.....	Hon. W. M. MURPHY
PALM BEACH COUNTY.....	Hon. R. C. ALLEY
POLK COUNTY.....	Hon. ROY H. AMIDON

## JUDGES OF THE COURT OF CRIMES

DADE COUNTY.....	Hon. WAYNE ALLEN*
	Hon. N. VERNON HAWTHORNE**

\*On military leave.

\*\*Acting.



## JUDGES OF THE CIVIL COURTS OF RECORD

DADE COUNTY.....	Hon. D. J. HEFFERMAN
	Hon. NORMAN HENDRY
DUVAL COUNTY.....	Hon. BURTON BARRS

## JUDGES OF THE JUVENILE AND DOMESTIC RELATIONS COURTS

BREVARD COUNTY.....	Hon. ALBERT M. BOLAND
DADE COUNTY.....	Hon. WALTER H. BECKHAM
DUVAL COUNTY.....	Hon. W. S. CRISWELL
HILLSBOROUGH COUNTY.....	Hon. PAUL R. KICKLITER
MONROE COUNTY.....	Hon. FRANK O. ROBERTS
ORANGE COUNTY.....	Hon. MATTIE H. FARMER
PINELLAS COUNTY.....	Hon. LINCOLN C. BOGUE
POLK COUNTY.....	Hon. W. F. BEVIS

## STATE ATTORNEYS

FIRST CIRCUIT.....	Hon. J. EDWIN HOLSBERRY, Pensacola
SECOND CIRCUIT.....	Hon. O. C. PARKER, JR., Tallahassee
THIRD CIRCUIT.....	Hon. A. K. BLACK, * Lake City
	Hon. DAVID LANIER, ** Madison
FOURTH CIRCUIT.....	Hon. WILLIAM A. HALLOWS, III, * Jacksonville
	Hon. INMAN P. CRUTCHFIELD, ** Jacksonville
FIFTH CIRCUIT.....	Hon. J. W. HUNTER, Tavares
SIXTH CIRCUIT.....	Hon. CHESTER B. McMULLEN, Clearwater
SEVENTH CIRCUIT.....	Hon. MURRAY SAMS, DeLand
EIGHTH CIRCUIT.....	Hon. T. E. DUNCAN, Gainesville
NINTH CIRCUIT.....	Hon. MURRAY W. OVERSTREET, Kissimmee
TENTH CIRCUIT.....	Hon. L. GRADY BURTON, Wauchula
ELEVENTH CIRCUIT.....	Hon. STANLEY MILLEDGE, Miami
TWELFTH CIRCUIT.....	Hon. CLYDE H. WILSON, Sarasota
THIRTEENTH CIRCUIT.....	Hon. J. REX FARRIOR, Tampa
FOURTEENTH CIRCUIT.....	Hon. L. D. McRAE, Chipley
FIFTEENTH CIRCUIT.....	Hon. PHIL O'CONNOLL, * West Palm Beach
	Hon. SIDNEY J. CATTS, JR., ** West Palm Beach

\*On military leave.

\*\*Acting.

## ASSISTANT STATE ATTORNEYS

FIRST CIRCUIT.....	None
SECOND CIRCUIT.....	None
THIRD CIRCUIT.....	Hon. O. O. EDWARDS, Cross City
FOURTH CIRCUIT.....	Hon. NATHAN SCHEVITZ, Jacksonville
	Hon. HERBERT WM. FISHER, Fernandina
FIFTH CIRCUIT.....	Hon. D. NEIL FERGUSON, Ocala
SIXTH CIRCUIT.....	Hon. W. H. BREWTON, Dade City
SEVENTH CIRCUIT.....	Hon. JULIAN C. CALHOUN, Palatka
EIGHTH CIRCUIT.....	Hon. JOE HILL WILLIAMS, Lake Butler
NINTH CIRCUIT.....	Hon. THAD H. CARLTON, Ft. Pierce
	Hon. GEORGE A. DeCOTTES, Sanford
TENTH CIRCUIT.....	Hon. WALTER W. WOOLFOLK, Lake Wales
ELEVENTH CIRCUIT.....	Hon. H. FROST BAILEY, Miami
	Hon. HENRY M. JONES, Key West
TWELFTH CIRCUIT.....	Hon. W. M. SMILEY, Bradenton
	Hon. SUMTER LEITNER, Arcadia
THIRTEENTH CIRCUIT.....	Hon. J. FRANK UMSTOT, Tampa
FOURTEENTH CIRCUIT.....	Hon. E. CLAY LEWIS, Port St. Joe
FIFTEENTH CIRCUIT.....	Hon. LOUIS F. MAIRE, Ft. Lauderdale

\*On military leave.

\*\*Acting.

## COUNTY SOLICITORS

DADE COUNTY.....	Hon. ROBERT R. TAYLOR, Miami
DUVAL COUNTY.....	Hon. WAYNE E. RIPLEY,* Jacksonville
	Hon. HARRY H. MARTIN,** Jacksonville
ESCAMBIA COUNTY.....	Hon. FORSYTH CARO, Pensacola
HILLSBOROUGH COUNTY.....	Hon. JOSEPH E. WILLIAMS,*** Tampa
MONROE COUNTY.....	Hon. ALLAN B. CLEARE, JR., Key West
ORANGE COUNTY.....	Hon. O. RAYMOND ELLARS, Orlando
PALM BEACH COUNTY.....	Hon. W. E. ROEBUCK, West Palm Beach
POLK COUNTY.....	Hon. GUNTER STEPHENSON,* Bartow
	Hon. B. G. LANGSTON,** Lakeland

\* On military leave.

\*\* Acting.

\*\*\* Luther W. Cobbey, Tampa, was nominated in May primaries for appointment to office.

## ASSISTANT COUNTY SOLICITORS

DADE COUNTY.....	Hon. GLENN C. MINCER, Miami
	Hon. LOUIS J. HAMEL, Miami
	Hon. ROLAND B. SWEET, Miami
	Hon. JOHN PRUNTY,* Miami
DUVAL COUNTY.....	Hon. A. LLOYD LAYTON, Jacksonville
ESCAMBIA COUNTY.....	Hon. J. MONTROSE EDREHI, Pensacola
HILLSBOROUGH COUNTY.....	Hon. B. A. GREGORY, Tampa
	Hon. JOSEPH G. SPICOLA, Tampa
	Hon. HARRY G. McDONALD, Tampa
MONROE COUNTY.....	None
ORANGE COUNTY.....	None
PALM BEACH COUNTY.....	None
POLK COUNTY.....	Hon. JESSE H. WILLSON, Bartow

\* On military leave.

## COUNTY PROSECUTING ATTORNEYS

BROWARD COUNTY.....	Hon. W. GERRY MILLER, Ft. Lauderdale
DESOTO COUNTY.....	Hon. M. A. ROSIN, Arcadia
GADSDEN COUNTY.....	Hon. WILLIAM D. DOSS, Quincy
INDIAN RIVER COUNTY.....	Hon. SHERMAN N. SMITH, JR.,* Vero Beach
	Hon. C. P. DIAMOND,** Vero Beach
JEFFERSON COUNTY.....	Hon. JOHN H. SHUMAN, Monticello
LEE COUNTY.....	Hon. JOHN K. WOOLSLAIR, Ft. Myers
LEON COUNTY.....	Hon. WILLIAM D. HOPKINS,* Tallahassee
	Hon. WELDON G. STARRY,** Tallahassee
MADISON COUNTY.....	Hon. COLUMBUS B. SMITH, Madison
MANATEE COUNTY.....	Hon. GEO. R. HITCHCOLK, Bradenton
MARTIN COUNTY.....	Hon. T. T. OUGHTERSON, Stuart
OKEECHOBEE COUNTY.....	Hon. MARY SANDAFUR SCHULMAN, Okeechobee
OSCEOLA COUNTY.....	Hon. JAY JOHNSTON, St. Cloud
PASCO COUNTY.....	Hon. T. H. GETZEN, Dade City
PINELLAS COUNTY.....	Hon. JOHN DICKINSON,* Clearwater
	Hon. VICTOR O. WEHLE,** St. Petersburg
ST. LUCIE COUNTY.....	Hon. A. C. SIMMONS, Ft. Pierce
SARASOTA COUNTY.....	Hon. LAMAR B. DOZIER, Sarasota
SEMINOLE COUNTY.....	Hon. GEORGE A. SPEER, JR., Sanford
SUMTER COUNTY.....	Hon. JAMES W. WEST, Bushnell

\* On military leave.

\*\* Acting.

# REPORTS OF STATE ATTORNEYS FOR YEARS 1943-1944, INCLUSIVE, UNDER SECTION 16.09, FLORIDA STATUTES, 1941.

## FIRST JUDICIAL CIRCUIT

Escambia County  
Okaloosa County

Santa Rosa County  
Walton County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
ESCAMBIA:					
Assault with Intent to Commit a Felony	1	—	—	1	*1
Crime Against Nature	*1	—	—	—	—
Homicide:					
Murder, First Degree	9	—	—	2	2
Murder, Second Degree	—	—	—	3	—
Manslaughter	2	—	—	1	*2
Rape	2	2	—	—	2
Miscellaneous Crimes Not Otherwise Listed	*4	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	4	4
Bond Validation Proceedings	6	5
Criminal Hearings Attended	19	19
Habeas Corpus Hearings Attended	9	9
Other Cases Not Enumerated	7	7

\* Certified to Court of Record.

Respectfully submitted,

J. EDWIN HOLSBERRY,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
OKALOOSA:					
Adultery	4	—	2	1	—
Aggravated Assault	12	6	—	14	1
Assault with Intent to Commit a Felony	13	9	—	9	1
Attempt to Commit a Felony	1	—	—	—	1
Breaking and Entering	14	2	—	13	—
Gambling Houses	2	—	—	2	—
Homicide:					
Murder, First Degree	1	1	—	1	—
Manslaughter	4	—	1	2	1
Larceny	8	7	1	6	1
Liquor	3	1	—	2	1
Nonsupport or Desertion	4	2	1	2	—

Perjury .....	3	—	—	3	—
Rape .....	1	11	1	—	—
Robbery .....	3	1	—	—	3
Worthless Checks and Drafts .....	1	—	—	1	—
Miscellaneous Crimes Not Otherwise Listed .....	16	14	—	14	—
Returned to County Court—14					

## OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings .....	2	1
Criminal Hearings Attended .....	7	7
Habeas Corpus Hearings Attended .....	1	1
Other Cases Not Enumerated .....	8	8

Respectfully submitted,

J. EDWIN HOLSBERRY,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
SANTA ROSA:					
Aggravated Assault .....	3	—	—	3	—
Arson .....	—	2	—	—	—
Assault with Intent to Commit a Felony .....	11	10	1	7	2
Attempt to Commit a Felony .....	1	—	1	—	—
Bigamy .....	—	1	—	—	—
Breaking and Entering .....	13	—	—	13	—
Carnal Intercourse with Unmarried Female .....	2	—	2	—	—
Crime Against Nature .....	1	—	—	1	—
Forgery .....	1	—	—	1	—
Gambling Houses .....	1	—	—	1	—
Homicide:					
Murder, First Degree .....	1	1	—	1	—
Murder, Second Degree .....	1	—	—	—	—
Manslaughter .....	—	1	—	1	—
Larceny .....	14	13	1	7	6
Liquor .....	2	—	—	2	—
Nonsupport or Desertion .....	2	1	1	1	—
Rape .....	—	1	—	—	—
Robbery .....	1	—	—	1	—
Miscellaneous Crimes Not Otherwise Listed .....	21	6	—	11	1

## OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings .....	1	1
Criminal Hearings Attended .....	8	8
Other Cases Not Enumerated .....	6	6

Respectfully submitted,

J. EDWIN HOLSBERRY,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>WALTON:</b>					
Adultery	4	—	2	2	—
Aggravated Assault	4	2	—	4	—
Arson	—	2	—	—	—
Assault with Intent to Commit a Felony	9	5	—	8	1
Bigamy	1	—	—	1	—
Breaking and Entering	7	2	1	5	1
Carnal Intercourse with Unmarried Female	1	—	—	—	1
Forgery	2	—	—	2	—
<b>Homicide:</b>					
Murder, First Degree	2	—	—	2	—
Murder, Second Degree	1	—	—	—	—
Manslaughter	2	—	—	11	—
Larceny	11	—	3	8	—
Liquor	4	2	4	—	—
Nonsupport or Desertion	2	2	1	1	—
Perjury	5	1	1	4	—
Receiving Stolen Property	1	—	—	1	—
Worthless Checks and Drafts	1	(to county court)			
Miscellaneous Crimes Not Otherwise Listed	11	11	2	8	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	6	4
Bond Estreature Proceedings	3	3
Criminal Hearings Attended	5	5
Other Cases Not Enumerated	7	7

Respectfully submitted,

J. EDWIN HOLSBERRY,  
State Attorney.

## SECOND JUDICIAL CIRCUIT

Franklin County  
Gadsden County  
Jefferson CountyLeon County  
Liberty County  
Wakulla County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>FRANKLIN:</b>					
Assault with Intent to Commit a Felony	10	2	—	7	—
Desertion	2	—	—	1	—
Election Fraud	2	—	—	—	—
Extortion and Malpractice	10	3	—	—	—
False Pretense	—	1	—	—	—
Forgery	3	—	—	2	—
<b>Homicide:</b>					
Murder, First Degree	2	—	—	1	—
Larceny	4	—	—	1	—
Malicious Destruction of Property	2	—	1	—	1



Rape .....	1	—	—	1	—
Receiving Stolen Property .....	2	—	—	1	—
Resisting an Officer .....	2	—	—	1	—
Robbery .....	7	2	—	5	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended .....	29	—
Other Cases Not Enumerated .....	30	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>GADSDEN:</b>					
Abortion .....	—	—	—	1	—
Adultery .....	1	—	—	—	—
Arson .....	2	1	—	1	—
Assault with Intent to Commit a Felony .....	7	—	—	5	2
Bigamy .....	3	1	—	2	—
Breaking and Entering .....	34	5	—	27	3
Desertion .....	7	2	—	3	1
False Pretense .....	2	1	—	1	—
Forgery .....	4	1	—	2	1
Homicide:					
Murder, First Degree .....	5	—	—	—	—
Murder, Second Degree .....	2	1	—	1	—
Manslaughter .....	5	2	—	2	1
Larceny .....	11	5	—	6	2
Rape .....	5	1	—	3	—
Receiving Stolen Property .....	5	1	—	4	1
Robbery .....	1	—	—	—	—
Shooting into Dwelling .....	3	1	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court .....	3	—
Criminal Hearings Attended .....	20	—
Other Cases Not Enumerated .....	15	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>JEFFERSON:</b>					
Arson .....	2	—	—	2	—
Assault with Intent to Commit a Felony .....	5	—	—	4	—
Breaking and Entering .....	3	—	—	2	—

## Homicide:

Murder, First Degree	1	—	—	—	—
Larceny	3	—	—	2	—
Rape	1	—	—	1	—
Receiving Stolen Property	1	—	—	1	—
Resisting an Officer	1	—	—	1	—
Robbery	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	9	—
Other Cases Not Enumerated	15	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
LEON:					
Adultery	1	—	—	1	—
Arson	3	1	—	2	—
Assault with Intent to Commit a Felony	54	7	3	41	2
Bigamy	1	—	—	—	—
Breaking and Entering	33	5	2	28	3
Crime Against Nature	5	—	—	4	1
Desertion	21	—	—	16	2
Embezzlement	12	1	—	5	1
False Pretense	9	—	—	8	1
Forgery	29	4	1	25	3
Hit and Run Driving	2	—	—	1	—
Homicide:					
Murder, First Degree	4	—	—	3	1
Murder, Second Degree	6	—	—	4	1
Manslaughter	5	—	—	4	2
Illegal Possession of Moonshine	2	—	—	1	—
Larceny	34	3	1	28	4
Mayhem	3	—	—	1	—
Operating Truck for Hire Without Permit	—	4	—	3	—
Perjury	2	—	—	1	—
Rape	5	—	—	4	—
Receiving Stolen Property	14	2	1	11	2
Robbery	4	—	—	2	—
Selling Car Subject to Lien	4	—	—	3	—
Shooting into Dwelling	2	—	—	1	—
Worthless Checks and Drafts	7	—	—	5	1

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	25	—
Habeas Corpus Hearings Attended	5	—
Other Cases Not Enumerated	20	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>LIBERTY:</b>					
Assault with Intent to Commit a Felony.....	2	—	—	2	—
Desertion .....	1	—	1	—	—
Larceny .....	2	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	10	—
Other Cases Not Enumerated.....	5	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>WAKULLA:</b>					
Aggravated Assault.....	3	—	1	2	1
Assault with Intent to Commit a Felony.....	2	—	—	1	—
Bigamy .....	1	—	—	1	—
Breaking and Entering.....	7	—	1	5	1
Desertion .....	4	—	—	2	—
Drunken Driving.....	1	—	—	—	—
Homicide:					
Murder, First Degree.....	2	—	—	—	—
Murder, Second Degree.....	1	—	—	1	—
Manslaughter.....	3	—	1	2	—
Imputing want of Chastity.....	1	—	—	—	—
Larceny .....	1	—	—	1	—
Resisting an Officer.....	1	—	—	1	—
Robbery .....	3	—	—	2	—
Shooting Hogs.....	1	—	—	1	—
Trespass to Realty.....	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	19	—
Other Cases Not Enumerated.....	20	—

Respectfully submitted,

O. C. PARKER, JR.,  
State Attorney.



## THIRD JUDICIAL CIRCUIT

Columbia County  
Dixie County  
Hamilton County  
Lafayette County

Madison County  
Suwanee County  
Taylor County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>COLUMBIA:</b>					
Adultery .....	—	1	—	—	—
Assault with Intent to Commit a Felony .....	6	7	—	1	1
Attempt to Commit a Felony .....	1	—	—	—	1
Breaking and Entering .....	8	10	1	5	—
Embezzlement .....	—	1	—	—	—
Forgery .....	1	—	—	1	—
Hit and Run Driver .....	—	1	—	—	—
Homicide:					
Murder, First Degree .....	6	1	—	—	—
Murder, Second Degree .....	—	—	—	2	—
Murder, Third Degree .....	—	—	—	2	—
Manslaughter .....	—	—	—	2	—
Larceny .....	14	10	4	4	1
Nonsupport or Desertion .....	5	2	—	—	—
Rape .....	1	—	—	—	1
Receiving Stolen Property .....	5	—	—	3	—
Robbery .....	1	—	—	1	—
Trespass .....	3	3	1	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended .....	26	3 Informations Filed
Inquests Attended .....	2	1 Accidental Death
		1 Murder by Unknown Party
Inquests Before County Judge .....	9	5 Held for Murder
		4 Accidental Deaths
Preliminary Hearings Attended .....	3	Defendants Held
Other Cases Not Enumerated .....	3	2 Orders entered releasing Defendant's Auto Held for Confiscation.

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>DIXIE:</b>					
Assault with Intent to Commit a Felony .....	5	—	1	1	3
Breaking and Entering .....	10	—	—	10	—
Forgery .....	2	—	—	2	—

## Homicide:

Murder, First Degree	4	—	—	—	—
Murder, Second Degree	—	1	—	2	1
Murder, Third Degree	—	—	—	1	—
Manslaughter	—	—	—	1	—
Injury to Public Property	—	2	—	—	—
Larceny	6	1	—	3	—
Malicious Killing of Animal of Another	1	—	—	1	—
Nonsupport or Desertion	13	—	—	5	1
Rape	1	—	1	—	—
Unlawfully Resisting an Officer	2	2	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	1	Reversed
Criminal Hearings Attended	29	9 Information Filed
		4 Prisoners Released
Habeas Corpus Hearings Attended	6	3 Defendants Released
Inquests Attended	4	3 Held for Murder
		1 Accused Released

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

## HAMILTON:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Aggravated Assault	—	1	—	—	—
Arson	—	1	—	—	—
Assault with Intent to Commit a Felony	2	4	—	1	—
Breaking and Entering	7	2	—	5	—
False Pretense	—	1	—	—	—
Forgery	1	—	—	1	—
Hit and Run Driver	—	1	—	—	—
Homicide:					
Murder, First Degree	2	1	—	—	1
Manslaughter	—	—	—	1	—
Injury to Public Property	1	—	—	—	—
Larceny	5	4	—	3	2
Malicious Burning Woods of Another	1	—	—	—	—
Nonsupport or Desertion	1	1	—	1	—
Rape	—	1	1	—	—
Receiving Stolen Property	1	—	—	—	—
Robbery	3	1	—	2	—
Unlawfully Exhibiting Deadly Weapon	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	28	1 Dismissed
		2 Defendants Held
		2 Informations Filed
Inquests Attended	1	Accused Held for Murder

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>LAFAYETTE:</b>					
Breaking and Entering.....	2	—	—	2	—
False Pretense.....	—	1	—	—	—
Homicide:					
Murder, First Degree.....	—	1	—	—	—
Manslaughter.....	1	—	—	1	—
Killing Animal of Another.....	1	—	—	—	—
Larceny.....	3	—	3	3	—
Unlawfully Impersonating an Officer.....	—	—	3	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	13	2 Informations Filed
Inquests Before County Judge.....	1	Accused Released

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>MADISON:</b>					
Adultery.....	1	2	1	—	—
Assault with Intent to Commit a Felony.....	6	1	1	2	—
Breaking and Entering.....	4	3	—	5	—
False Pretense.....	—	—	1	—	—
Forgery.....	—	1	—	1	—
Homicide:					
Murder, First Degree.....	3	—	—	—	2
Murder, Second Degree.....	—	—	—	1	—
Larceny.....	7	4	2	4	2
Nonsupport or Desertion.....	17	2	2	3	1
Perjury.....	—	1	1	—	—
Rape.....	—	1	—	—	—
Throwing a Piece of Paving into Dwelling House.....	—	1	—	—	—
Unlawfully Entering Building of Another Without Breaking.....	1	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	28	1 Information Filed
		1 Defendant Allowed Bail
Habeas Corpus Hearings Attended.....	2	1 Defendant Held
		1 Defendant Remanded to Custody of Sheriff
Inquests Before County Judge.....	1	—

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>SUWANNEE:</b>					
Adultery	1	—	—	—	—
Aggravated Assault	—	—	—	2	—
Assault and Battery	—	—	—	1	—
Assault with Intent to Commit a Felony	9	1	1	3	1
Attempt to Commit a Felony	2	—	2	—	—
Breaking and Entering	8	—	1	5	2
Embezzlement	2	—	—	1	—
False Pretense	—	1	—	—	—
<b>Homicide:</b>					
Murder, First Degree	4	4	—	—	1
Manslaughter	—	1	—	3	—
Larceny	12	7	7	4	2
Nonsupport or Desertion	2	2	—	—	—
Rape	1	—	—	—	—
Receiving Stolen Property	—	—	1	—	1
Robbery	2	—	—	—	1
Unlawfully Killing a Dog	1	—	—	—	—
Unlawfully Killing Animal of Another	—	2	—	—	—
Unlawfully Maiming an Animal	—	1	—	—	—
Unlawfully Resisting Arrest	1	1	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings	1	Judgment for Plaintiff
Criminal Hearings Attended	13	
Habeas Corpus Hearings Attended	4	Defendants Discharged
Inquests Attended	4	1 Person Killed by Party Unknown
		2 Accused Held for Murder
		1 Accidental Death

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>TAYLOR:</b>					
Aggravated Assault	—	—	—	1	—
Aiding Prisoner to Escape	—	2	—	—	—
Assault with Intent to Commit a Felony	5	—	1	—	—
Attempt to Commit a Felony	1	—	—	—	—
Breaking and Entering	1	2	—	—	—
Crime Against Nature	1	—	—	1	—
Embezzlement	2	—	—	—	—
Hit and Run Driver	1	—	—	1	—

**Homicide:**

Murder, First Degree	2	—	—	—	1
Manslaughter	1	1	—	1	1
Larceny	9	7	4	4	3
Nonsupport or Desertion	11	2	—	8	1
Rape	3	—	1	—	1
Unlawfully Disposing of Personal Property Under Lien	1	—	—	—	1
Unlawfully Injuring a Public Bridge	1	—	—	—	1

**OTHER CASES HANDLED**

	Number	Disposition
Criminal Hearings Attended	23	1 Defendant Held 1 Defendant Adjudged Insane
Habeas Corpus Hearings Attended	1	Defendant Held
Inquests Before County Judge	7	

Respectfully submitted,

DAVID LANIER,  
Acting State Attorney.

**FOURTH JUDICIAL CIRCUIT**

Clay County

Nassau County

Duval County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>CLAY:</b>					
Assault with Intent to Commit a Felony	1	—	—	—	1
Bigamy	1	—	—	1	—
Breaking and Entering	5	—	—	4	1
Embezzlement	1	—	—	1	—
Larceny	5	—	—	5	—
Robbery	1	—	—	1	—

**OTHER CASES HANDLED**

	Number	Disposition
Criminal Hearings Attended	6	—
Habeas Corpus Hearings Attended	5	—
Other Cases Not Enumerated	17	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,  
State Attorney.

**DUVAL:****Homicide:**

Murder, First Degree	12	—	—	9	2
Murder, Second Degree	16	—	—	—	—
Manslaughter	9	—	—	—	—
Rape	3	—	—	2	—



## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings.....	1	
Criminal Hearings Attended.....	73	37 Held for Grand Jury 29 Exonerated 7 Met Death by Party or Parties Unknown
Habeas Corpus Hearings Attended.....	16	—
Other Cases Not Enumerated.....	50	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>NASSAU:</b>					
Arson.....	1	—	—	1	—
Assault with Intent to Commit a Felony.....	1	—	—	1	—
Breaking and Entering.....	4	—	—	4	—
<b>Homicide:</b>					
Murder, First Degree.....	1	—	—	1	—
Murder, Second Degree.....	1	—	—	—	1
Larceny.....	1	—	—	1	—
Resisting Officer.....	1	—	—	1	—
Robbery.....	1	—	—	—	1

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	11	—
Habeas Corpus Hearings Attended.....	5	—
Other Cases Not Enumerated.....	16	—

Respectfully submitted,

INMAN P. CRUTCHFIELD,  
State Attorney.

## FIFTH JUDICIAL CIRCUIT

Citrus County                      Lake County  
Hernando County                  Marion County  
Sumter County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>CITRUS:</b>					
Aggravated Assault.....	3	—	—	3	—
Assault with Intent to Commit a Felony.....	1	—	—	1	—
Breaking and Entering.....	9	1	—	6	—
Escape from Prison.....	2	—	—	—	—
<b>Homicide:</b>					
Murder, First Degree.....	3	2	—	3	—
Murder, Second Degree.....	1	—	—	1	—
Manslaughter.....	1	—	—	1	—

Larceny	7	—	—	5	—
Malicious Injury to Property	2	—	—	—	—
Mayhem	1	—	—	—	—
Nonsupport or Desertion	1	1	—	—	—
Rape	—	3	—	—	—
Resisting an Officer	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	6	Bound Over
Habeas Corpus Hearings Attended	1	Denied

Respectfully submitted,

J. W. HUNTER,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>HERNANDO:</b>					
Aggravated Assault	5	—	—	5	—
Assault with Intent to Commit a Murder	2	—	—	2	—
Breaking and Entering	6	—	—	6	—
Hog Stealing	5	—	—	5	—
<b>Homicide:</b>					
Murder, First Degree	4	—	—	4	—
Murder, Third Degree	1	—	—	1	—
Manslaughter	1	—	—	1	—
Larceny	22	—	—	15	*2
Liquor	4	—	4	—	4
Narcotics	1	—	—	1	—
Nonsupport or Desertion	2	—	—	2	—
Rape	1	—	—	1	—
Robbery, Armed	3	—	—	3	—

\* U. S. Army.

Respectfully submitted,

J. W. HUNTER,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>LAKE:</b>					
Adultery	1	—	—	—	—
Aggravated Assault	—	1	—	—	—
Aiding Prisoner to Escape	1	—	—	1	—
Arson	—	1	—	—	—
Assault with Intent to Commit a Felony	19	3	1	5	—
Breaking and Entering	16	5	2	11	—
Crime Against Nature	1	—	—	1	—
Forgery	3	1	—	1	—
Gambling Devices	7	—	—	7	—
Hit and Run Driver	1	—	—	1	—

## Homicide:

Murder, First Degree	6	2	—	5	—
Murder, Second Degree	10	—	—	10	—
Manslaughter	6	8	—	2	—
Killing Bull of Another	1	1	—	—	—
Larceny (Grand)	8	3	1	3	—
Nonsupport or Desertion	11	—	5	2	—
Practicing Medicine without License	1	—	—	1	—
Rape	—	1	—	—	—
Receiving Stolen Property	—	1	—	—	—
Selling Beer to Minor	1	—	1	—	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	6	—
Bond Estreature Proceedings	12	—
Criminal Hearings Attended	30	—
Habeas Corpus Hearings Attended	6	—
Other Cases Not Enumerated	3	—

Respectfully submitted,

J. W. HUNTER,  
State Attorney.

## MARION:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Assault with Intent to Commit a Felony	20	3	4	10	1
Bigamy	3	—	—	1	—
Breaking and Entering	22	1	1	20	—
Carnal Intercourse with Unmarried Female	2	—	—	—	—
Carrying on—Immigrant Agt. Without License	1	—	1	—	—
Cutting Wire Fence	1	—	—	—	1
Embezzlement	1	—	1	—	—
Escape	4	—	—	4	—
Forgery	12	—	—	9	—
Fraudulently Marking Unmarked Animal	3	—	—	—	1
Hit and Run	2	—	—	1	2
Homicide:					
Murder, First Degree	10	1	—	1	4
Murder, Second Degree	—	—	—	1	—
Manslaughter	2	—	—	1	2
Larceny	24	2	4	23	—
Lewd & Lascivious Behavior	1	—	1	—	—
Malicious Injury to Property	1	—	—	—	—
Nonsupport or Desertion	9	—	2	3	—
Rape	1	—	—	—	—
Receiving Stolen Property	5	—	1	3	—
Robbery	6	—	—	3	—
Shooting into Automobile	1	—	—	1	—
Sodomy	1	—	—	1	—
Worthless Checks and Drafts	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Bond Estreature Proceedings	3	—



Criminal Hearings Attended	20	—
Habeas Corpus Hearings Attended	5	—

Respectfully submitted,

J. W. HUNTER,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>SUMTER:</b>					
Adultery	1	—	1	—	—
Assault with Intent to Commit a Felony	7	1	5	5	—
Bigamy	1	—	—	1	—
Breaking and Entering	11	—	6	5	—
Embezzlement	1	—	1	—	—
False Pretense	2	—	—	2	—
<b>Homicide:</b>					
Murder, First Degree	2	1	—	—	—
Murder, Second Degree	2	1	—	1	—
Manslaughter	—	—	—	2	—
Larceny	4	3	15	1	1
Nonsupport or Desertion	—	1	1	—	—
Receiving Stolen Property	1	—	1	—	—
Miscellaneous Crimes Not Otherwise Listed	3	—	1	2	—

**OTHER CASES HANDLED**

	Number	Disposition
Criminal Hearings Attended	10	—

Respectfully submitted,

J. W. HUNTER,  
State Attorney.

**SIXTH JUDICIAL CIRCUIT****Pasco County****Pinellas County**

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>PASCO:</b>					
Aggravated Assault	—	—	—	1	—
Assault with Intent to Commit a Felony	5	1	—	3	1
Breaking and Entering	7	—	—	6	—
Carnal Intercourse with Unmarried Female	—	—	—	1	—
Embezzlement	2	—	—	1	—
Forgery	1	—	—	1	—
Gambling Houses	—	—	—	—	1
<b>Homicide:</b>					
Murder, First Degree	5	—	—	2	1
Murder, Second Degree	1	—	—	1	—
Manslaughter	—	—	—	1	—
Kidnaping	—	—	1	—	—
Larceny	6	2	—	6	1

Nonsupport or Desertion	1	—	1	—	—
Robbery	1	—	—	1	—
Worthless Checks and Drafts	—	—	1	—	1

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	6	Validated
Bond Estreature Proceedings	1	Estreated
Criminal Hearings Attended	14	—

Respectfully submitted,

CHESTER B. McMULLEN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>PINELLAS:</b>					
Accessory after the Fact	—	1	—	—	—
Adultery	—	1	—	—	—
Aggravated Assault	—	—	—	1	—
Aiding Prisoner to Escape	—	1	—	—	—
Assault with Intent to Commit a Felony	9	1	1	3	3
Attempt to Break and Enter	1	—	—	1	—
Attempt to Commit Rape	2	1	—	1	1
Attempt to Poison an Animal	—	1	—	—	—
Bastardy	—	—	—	1	—
Bigamy	3	—	1	1	—
Breaking and Entering	28	—	3	28	2
Bribery	1	—	—	—	—
Carnal Intercourse with Unmarried Female	3	—	—	2	—
Crime Against Nature	9	2	—	2	—
				7	
				Pending	
Embezzlement	6	2	1	2	—
Entering Without Breaking	3	—	2	2	—
Extortion	1	—	1	—	—
False Pretense	3	2	1	2	—
Forgery	2	—	—	1	—
G. L. and Aiding in Concealing Stolen Goods	1	—	1	—	—
Homicide:					
Murder, First Degree	5	1	—	1	—
				3	
				Pending	
Murder, Second Degree	1	—	—	1	—
Manslaughter	—	2	—	3	—
Incest	—	1	—	—	—
Larceny	11	3	3	6	1
Lottery	2	—	—	1	2
Narcotics	4	2	—	2	—
Nonsupport or Desertion	21	5	4	10	—
Perjury	1	—	—	1	—
Rape	—	2	—	—	—
Receiving Stolen Property	1	2	—	1	—
Robbery	4	—	1	2	—
				(1 Pled to Assault and Battery)	
Violation of Securities Act	1	—	—	—	—
Worthless Checks and Drafts	3	—	—	2	—

## OTHER CASES HANDLED

	Number	Disposition
Abatement of Nuisance.....	1	Still Pending
Appeals from Lower Court to Circuit Court.....	3	1 Guilty; 1 Not Guilty; 1 Bond Estreated
Bond Validation Proceedings.....	10	Validated
Bond Estreature Proceedings.....	10	4 Reinstated 6 Estreated
Criminal Hearings Attended.....	70	—
Habeas Corpus Hearings Attended.....	12	—
Inquests Attended.....	12	—
Petition for Reinstatement of Disbarment.....	2	1 Denied 1 Pending
Restorations.....	15	14 Restored 1 Pending
Cases Certified to County Court.....	17	—
Cases Certified to Justice of Peace Court.....	3	—
Cases Certified to Juvenile Court.....	4	—

Respectfully submitted,

CHESTER B. McMULLEN,  
State Attorney.

## SEVENTH JUDICIAL CIRCUIT

Flagler County  
Putnam CountySt. Johns County  
Volusia County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>FLAGLER:</b>					
Aggravated Assault.....	1	—	—	—	1
Breaking and Entering.....	1	—	—	1	—
Carnal Intercourse with Unmarried Female.....	1	—	—	1	—
Homicide:					
Manslaughter.....	2	—	—	2	—
Larceny.....	4	—	—	3	1

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	Discharged
Habeas Corpus Hearings Attended and Investigations.....	7	—
Other Cases Not Enumerated—Inquest.....	1	—

Respectfully submitted,

MURRAY SAMS,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>PUTNAM:</b>					
Aggravated Assault.....	2	1	—	2	—
Allowing Minors to Play Pool, etc.....	1	—	—	1	—

Assault with Intent to Commit a Felony	1	—	—	1	—
Breaking and Entering	8	1	—	8	—
Entering Without Breaking	3	2	—	2	*1
Failure to Secure Payment of Compensation	1	1	—	1	—
False Pretense	3	1	—	3	—
Forgery	3	—	—	3	—
Homicide:					
Murder, First Degree	4	—	—	2	2
Keeping House of Ill-Fame	1	—	1	—	—
Larceny	3	5	—	3	—
Leaving Scene of Motor Vehicle Accident	2	1	—	1	1
Lewd and Lascivious Cohabitation	1	—	—	1	—
Lottery—Setting up, promoting and conducting	1	—	—	1	—
Property, Hiding and Concealing under Lien	2	—	1	1	—
Preparing and Dispensing Prescriptions	1	—	—	1	—
Rape, Attempted	1	—	—	1	—
Receiving Stolen Property	1	—	—	1	—
Using Title of Doctor, etc.	2	—	—	2	—

\* Continued.

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	Completed
Criminal Hearings Attended	8	—
Habeas Corpus Hearings Attended	2	Completed

Respectfully submitted,

MURRAY SAMS,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
ST. JOHNS:					
Accessory after the Fact	2	—	2	—	—
Aggravated Assault	1	—	—	1	—
Aiding in Concealing Stolen Property	1	—	1	—	—
Assault with Intent to Commit Murder	4	1	1	2	*1
Attempt to Commit a Felony	1	—	—	1	—
Attempt to Rob While Armed	1	—	—	1	—
Breaking and Entering	6	—	1	5	—
Failure to Exhibit Operator's Licenses, etc.	1	—	1	—	—
Forgery	1	—	—	1	—
Hit and Run	1	—	1	—	—
Homicide:					
Murder, First Degree	2	—	—	1	1
Murder, Second Degree	1	—	—	1	—
Murder, Third Degree	1	—	1	—	—
Larceny	7	—	1	4	*1
Lewd and Indecent Assault upon Child	1	—	—	1	—
Manufacture of Liquor Without License	1	—	—	—	**1
Mayhem	1	—	—	—	*1
Nonsupport or Desertion	3	1	—	3	—
Perjury	1	—	1	—	—
Receiving Stolen Property	1	—	—	—	1
Resisting an Officer	2	—	1	1	—
Robbery, Armed	2	—	—	2	—
Unauthorized Use of Vehicle of Another	—	1	—	—	—

\* Continued.

† Not in Custody.

\*\* To Lower Court.

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	2	1 Completed 1 Not Completed
Bond Validation Proceedings.....	3	Completed
Criminal Hearings Attended.....	7	—
Habeas Corpus Hearings Attended.....	3	—

Respectfully submitted,

MURRAY SAMS,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
VOLUSIA:					
Aggravated Assault .....	4	2	1	3	—
Arson .....	—	1	—	—	—
Assault and Battery .....	*6	—	—	—	—
Assault with Intent to Commit Murder.....	6	5	1	4	**1
Attempt to Commit a Felony .....	4	1	1	3	—
Attempt to Entice Female from Home .....	†1	—	—	—	—
Bigamy .....	2	—	1	1	—
Breaking and Entering—Misdemeanor.....	14	6	3	9	**2
Breaking and Entering—Felony .....	3	—	—	3	—
Burning Woods .....	—	1	—	—	—
Buying and Receiving Stolen Property.....	2	2	1	—	1
Carnal Intercourse with Unmarried Female.....	—	1	—	—	—
Crime Against Nature .....	—	1	—	—	—
Embezzlement .....	1	—	—	1	—
False Pretense .....	—	1	—	—	—
Forgery .....	—	1	—	—	—
Gambling Houses .....	—	1	—	—	—
Homicide, Unlawful, etc.: .....	—	1	—	—	—
Murder, First Degree .....	3	2	—	††2 *†1	—
Murder, Second Degree .....	2	—	—	2	—
Manslaughter .....	1	3	—	1	—
Larceny .....	33	7	5	27	1
Leaving Scene of Accident .....	2	—	1	1	—
Malicious Mischief .....	—	1	—	—	—
Nonsupport or Desertion .....	2	4	1	—	**1
Obtaining Property by False Pretense.....	1	—	—	1	—
Possession of Implements for Conducting Lottery.....	1	1	1	—	—
Rape .....	1	3	—	—	1
Rape, Attempted .....	—	1	—	—	—
Removing Timber Without Consent.....	**1	—	—	—	—
Robbery .....	6	7	—	4	**†2
Robbery, Attempted .....	1	1	1	—	—
Taking and Using Property of Another.....	1	—	1	—	—
Using Auto of Another Without Authority.....	**†2	—	—	—	—
Worthless Checks and Drafts .....	—	3	—	—	—

\* To Lower Court.

\*\* Pending

† Mistrial

†† Plead Guilty to Manslaughter.

\*† Plead Guilty to Third Degree.

\*\*† To Military Authority.



## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	66	6 Pending
Bastardy .....	2	Completed
Bond Estreature Proceedings.....	2	
Bond Validation Proceedings.....	1	Completed
Criminal Hearings Attended and Investigations...	237	—
Habeas Corpus Hearings Attended.....	93	—
Inquests Attended.....	3	—

Respectfully submitted,

MURRAY SAMS,  
State Attorney.

## EIGHTH JUDICIAL CIRCUIT

Alachua County  
Baker County  
Bradford CountyGilchrist County  
Levy County  
Union County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>ALACHUA:</b>					
Adultery .....	3	2	—	2	1
Aggravated Assault .....	13	7	—	10	2
Aiding and Assisting Prisoners to Escape.....	2	—	—	2	—
Assault with Intent to Commit a Felony.....	15	25	2	13	2
Attempt to Commit a Felony.....	1	—	—	1	—
Bigamy .....	2	—	—	2	—
Breaking and Entering.....	30	4	2	25	1
Conveying Tools into Jail to Aid Escape.....	2	—	—	2	—
Crime Against Nature.....	1	—	—	1	—
Defacing Public Building.....	5	—	—	4	—
Embezzlement .....	5	2	1	4	—
Forgery .....	17	3	2	13	—
<b>Homicide:</b>					
Murder, First Degree.....	10	1	—	8	—
Manslaughter .....	—	2	—	—	—
Larceny .....	15	10	1	13	1
Mayhem .....	2	—	—	2	—
Nonsupport or Desertion.....	10	10	1	7	—
Obstructing Officer.....	4	—	1	3	—
Perjury .....	2	—	1	1	—
Rape .....	2	—	1	1	—
Receiving Stolen Property.....	8	4	1	6	2
Robbery .....	2	2	—	1	—
Violation of RR. Commission.....	2	—	—	2	—
Wilfully Cutting Fence.....	2	1	1	1	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	7	Affirmed
Bond Validation Proceedings.....	4	Validated
Bond Estreature Proceedings.....	2	—
Criminal Hearings Attended.....	25	—
Habeas Corpus Hearings Attended.....	10	—
Other Cases Not Enumerated.....	10	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>BAKER:</b>					
Adultery	2	2	1	1	—
Aggravated Assault	10	5	—	8	2
Assault with Intent to Commit a Felony	12	8	2	8	1
Attempt to Commit a Felony	2	3	1	1	—
Breaking and Entering	8	4	2	5	1
Embezzlement	2	1	1	1	—
Forgery	5	4	1	3	1
<b>Homicide:</b>					
Murder, First Degree	1	2	—	1	—
Murder, Second Degree	3	—	—	3	—
Manslaughter	1	1	—	1	—
Incest	2	—	—	2	—
Interfering with Conservation Officer	—	2	1	1	—
Larceny	12	10	2	7	1
Maiming or Disfiguring Hog	—	2	—	2	—
Mayhem	1	—	—	1	—
Nonsupport or Desertion	5	7	1	4	—
Perjury	1	—	—	1	—
Rape	1	—	—	1	—
Receiving Stolen Property	4	2	1	2	1
Robbery	2	3	1	1	—

**OTHER CASES HANDLED**

	Number	Disposition
Appeals from Lower Court to Circuit Court	2	Affirmed
Criminal Hearings Attended	13	—
Habeas Corpus Hearings Attended	4	—
Other Cases Not Enumerated	5	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>BRADFORD:</b>					
Adultery	1	2	—	1	—
Aggravated Assault	5	4	1	3	1
Arson	2	1	—	2	—
Assault with Intent to Commit a Felony	15	10	2	11	2
Attempt to Commit a Felony	2	—	—	2	—
Breaking and Entering	20	7	1	17	2
Embezzlement	4	5	1	2	1
False Pretense	1	5	—	1	—
Forgery	12	1	—	8	—
<b>Homicide:</b>					
Murder, First Degree	4	3	—	2	—
Murder, Second Degree	—	—	—	2	—
Manslaughter	4	5	1	3	1
Incest	1	—	—	—	1
Larceny	18	15	2	15	1

Nonsupport or Desertion.....	10	8	2	7	1
Rape.....	1	2	1	—	—
Receiving Stolen Property.....	3	2	1	1	1
Robbery.....	4	5	1	3	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	1	Affirmed
Bond Validation Proceedings.....	2	Validated
Bond Estreature Proceedings.....	2	—
Criminal Hearings Attended.....	15	—
Habeas Corpus Hearings Attended.....	5	—
Other Cases Not Enumerated.....	7	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>GILCHRIST:</b>					
Assault with Intent to Commit a Felony.....	8	3	1	7	—
Attempt to Commit a Felony.....	2	—	—	2	—
Carnal Intercourse with Unmarried Female.....	1	—	—	—	—
Embezzlement.....	1	—	—	1	—
Forgery.....	4	1	1	1	1
<b>Homicide:</b>					
Murder, First Degree.....	1	—	—	—	—
Murder, Second Degree.....	1	—	—	2	—
Larceny.....	3	2	—	2	1
Mayhem.....	2	—	—	2	—
Nonsupport or Desertion.....	4	2	1	3	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	8	—
Habeas Corpus Hearings Attended.....	2	—
Other Cases Not Enumerated.....	4	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>LEVY:</b>					
Adultery.....	—	2	—	—	—
Aggravated Assault.....	5	4	—	4	—
Assault with Intent to Commit a Felony.....	10	5	2	7	1
Attempt to Commit a Felony.....	1	—	—	1	—
Breaking and Entering.....	12	6	1	10	2
Burning Woods.....	2	—	—	1	—
Disposing of Personal Property Under Lien.....	3	—	—	2	—
Embezzlement.....	—	4	—	—	—

Forgery .....	5	2	1	4	—
Homicide:					
Murder, First Degree .....	3	4	—	1	—
Murder, Second Degree .....	—	—	—	1	—
Manslaughter .....	—	3	—	1	—
Larceny .....	11	4	1	9	1
Maliciously Injuring Personal Property .....	1	—	—	1	—
Maliciously Killing Cows .....	2	—	—	2	—
Nonsupport or Desertion .....	7	4	1	5	—
Rape .....	—	1	—	—	—
Receiving Stolen Property .....	—	3	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court .....	1	Affirmed
Criminal Hearings Attended .....	10	—
Habeas Corpus Hearings Attended .....	4	—
Other Cases Not Enumerated .....	5	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
UNION:					
Aggravated Assault .....	2	4	—	2	—
Assault with Intent to Commit a Felony .....	6	5	—	5	1
Attempt to Commit a Felony .....	1	—	—	1	—
Breaking and Entering .....	4	5	1	3	—
Forgery .....	6	2	—	6	—
Hit and Run .....	2	—	—	2	—
Homicide:					
Manslaughter .....	1	—	—	—	1
Larceny .....	7	5	1	5	2
Nonsupport or Desertion .....	2	—	—	2	—
Rape .....	—	2	—	—	—
Receiving Stolen Property .....	—	3	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings .....	1	Validated
Criminal Hearings Attended .....	5	—
Habeas Corpus Hearings Attended .....	10	—
Other Cases Not Enumerated .....	4	—

Respectfully submitted,

T. E. DUNCAN,  
State Attorney.

## NINTH JUDICIAL CIRCUIT

Brevard County  
Indian River County  
Martin County  
Okeechobee County

Orange County  
Osceola County  
Saint Lucie County  
Seminole County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>BREVARD:</b>					
Aggravated Assault .....	2	—	—	2	—
Assault with Intent to Commit a Felony .....	4	—	—	2	—
Attempt to Aid Escape .....	1	—	—	1	—
Breaking and Entering .....	18	—	—	15	2
Carnal Intercourse with Unmarried Female .....	1	—	—	1	—
Cutting Timber on Lands of Another .....	2	—	—	—	—
False Pretense .....	1	—	1	—	—
Forgery .....	2	—	—	2	—
<b>Homicide:</b>					
Murder, First Degree .....	1	—	1	—	—
Murder, Second Degree .....	5	—	—	3	1
Manslaughter .....	2	—	—	—	1
Larceny .....	26	—	3	24	—
Malicious Injury to Personal Property .....	1	—	—	1	—
Rape, Intent to Commit .....	1	—	—	1	—
Refusing to Comply with Blackout Orders .....	1	—	—	—	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>INDIAN RIVER</b>					
Adultery .....	1	—	1	—	—
Assault with Intent to Commit a Felony .....	6	4	—	4	2
Breaking and Entering .....	2	1	—	1	1
Embezzlement .....	2	—	—	2	—
Forgery .....	2	—	—	2	—
<b>Homicide:</b>					
Murder, First Degree .....	1	—	—	—	1
Larceny .....	5	—	2	2	1
Nonsupport or Desertion .....	1	—	—	Pending	—
Rape .....	1	—	—	—	1
Robbery .....	2	—	—	1	1

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended .....	30	
Habeas Corpus Hearings Attended .....	2	Remanded
Inquests .....	2	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.



**MARTIN:**

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Assault with Intent to Commit a Felony	2	2	1	1	—
Breaking and Entering	3	1	1	1	—
Homicide:					
Murder, First Degree	1	—	—	1	—

**OTHER CASES HANDLED**

	Number	Disposition
Habeas Corpus Hearings Attended	1	Remanded
Inquests	3	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.**OKEECHOBEE:**

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Assault with Intent to Commit a Felony	3	—	1	2	—
Bastardy Proceeding	—	—	1	—	—
Bigamy	1	—	—	Pending	—
Election Frauds	—	1	—	—	—
Forgery	1	—	—	1	—
Larceny	1	—	—	1	—

**OTHER CASES HANDLED**

	Number	Disposition
Inquests	3	Death Caused by Unknown Persons

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.**ORANGE:****OTHER CASES HANDLED**

	Number	Disposition
Appeals Hearings	1	—
Appeals from Lower Court to Circuit Court	1	—
Bond Validation Proceedings	1	—
Habeas Corpus Hearings Attended	10	—
Inquests	2	—
Investigations	38	—
Sanitary Hearings	11	—
Other Cases Not Enumerated	5	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>OSCEOLA:</b>					
Assault with Intent to Commit a Felony.....	1	—	—	1	—
Breaking and Entering .....	4	—	—	3	1
Forgery .....	5	—	—	3	1
Homicide:					
Murder, First Degree .....	4	—	1	2	—
Murder, Second Degree .....	—	—	—	1	—
Larceny .....	3	—	—	—	1
					*2

\* Continued.

#### OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	5	2 Tried, 1 Continued, 2 Writs of Error Quashed
Criminal Hearings Attended.....	2	—
Habeas Corpus Hearings Attended.....	2	—
Inquests .....	7	—
Investigations .....	12	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>ST. LUCIE:</b>					
Assault with Intent to Commit a Felony.....	6	2	—	4	2
Breaking and Entering .....	6	—	1	3	2
Carnal Intercourse with Unmarried Female.....	—	1	—	—	—
County Officer Exacting Illegal Compensation.....	1	—	—	Pending	—
Crime Against Nature .....	2	—	—	2	—
Homicide:					
Murder, First Degree.....	3	1	—	2	1
Larceny .....	7	—	1	3	1
Malicious Killing Animal of Another .....	—	1	—	—	—
Nonsupport or Desertion .....	—	1	—	—	—
Robbery .....	1	—	—	1	—

#### OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	40	—
Habeas Corpus Hearings Attended.....	3	Remanded
Inquests .....	6	—

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>SEMINOLE:</b>					
Assault with Intent to Commit a Felony	7	—	1	4	2
Bigamy	2	—	1	1	—
Breaking and Entering	4	—	—	3	—
Carnal Intercourse with Unmarried Female	1	—	—	—	1
Crime Against Nature	1	—	—	1	—
Embezzlement	1	—	—	1	—
Forgery	3	—	—	2	—
Homicide:					
Murder, First Degree	1	—	—	1	—
Murder, Second Degree	2	—	—	1	1
Manslaughter	1	—	—	—	1
Larceny	14	—	3	8	—
Mayhem	1	—	—	—	1
Nonsupport or Desertion	10	—	3	—	*7
Possession of Narcotics	1	—	—	1	—
Receiving Stolen Property	4	—	1	1	2
Robbery	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	3	Dismissed
Bond Validation Proceedings	1	—
Criminal Hearings Attended	27	—
Habeas Corpus Hearings Attended	5	—

\* On Probation.

Respectfully submitted,

MURRAY W. OVERSTREET,  
State Attorney.

## TENTH JUDICIAL CIRCUIT

Hardee County                      Polk County                      Highlands County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>HARDEE:</b>					
Aggravated Assault	27	8	2	25	2
Assault with Intent to Commit a Felony	4	5	—	—	—
Breaking and Entering	12	4	1	11	—
Embezzlement	2	—	1	—	1
False Pretense	4	—	—	4	—
Fence Cutting	2	—	—	—	—
Forgery	11	—	—	6	—
Homicide:					
Murder, Second Degree	3	—	—	3	—
Manslaughter	1	—	—	1	—
Larceny	6	2	—	6	—
Liquor	2	—	—	2	—
Nonsupport or Desertion	8	—	5	—	—

Rape .....	1	2	—	—	—
Robbery .....	1	—	—	1	—
Worthless Checks and Drafts .....	12	4	—	12	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings .....	7	—
Habeas Corpus Hearings Attended .....	4	—
Other Cases Not Enumerated .....	6	—

Respectfully Submitted,

L. GRADY BURTON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>HIGHLANDS:</b>					
Aggravated Assault .....	36	7	—	31	5
Assault with Intent to Commit a Felony .....	8	5	—	7	1
Breaking and Entering .....	21	—	2	17	2
Embezzlement .....	2	—	—	2	—
Forgery .....	8	—	2	6	—
Homicide:					
Murder, First Degree .....	1	—	—	1	—
Murder, Second Degree .....	2	—	—	2	—
Manslaughter .....	3	—	1	1	1
Larceny .....	7	—	—	5	—
Lottery .....	3	—	—	3	—
Nonsupport or Desertion .....	6	—	4	—	—
Prison Escape .....	3	—	—	3	—
Receiving Stolen Property .....	1	—	—	—	—
Resisting Arrest .....	4	—	—	3	1
Robbery .....	2	—	—	2	—
Worthless Checks and Drafts .....	4	—	1	3	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court .....	4	—
Bond Validation Proceedings .....	6	—
Bond Estreature Proceedings .....	3	—
Criminal Hearings Attended .....	8	—
Habeas Corpus Hearings Attended .....	3	—

Respectfully submitted,

L. GRADY BURTON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>POLK:</b>					
Homicide:					
Murder, First Degree .....	24	4	1	14	4
Murder, Second Degree .....	*4	—	—	—	—
Manslaughter .....	*2	—	—	—	—
Perjury .....	4	—	1	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	53	—
Bond Validation Proceedings.....	12	—
Bond Estreature Proceedings.....	9	—
Habeas Corpus Hearings Attended.....	14	—

\* Certified to Criminal Court.

Respectfully submitted,

L. GRADY BURTON,  
State Attorney.

## ELEVENTH JUDICIAL CIRCUIT

Dade County

Monroe County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
DADE:					
Assault with Intent to Commit Rape.....	—	—	—	4	—
Attempted Rape.....	1	—	—	—	—
Bribery.....	2	—	—	—	—
Crime Against Nature.....	1	—	—	—	—
Gambling Houses—Operation.....	5	—	—	—	—
Homicide:	—	13	—	—	—
Murder, First Degree.....	32	1	2	3	10
Murder, Second Degree.....	5	—	—	3	—
Manslaughter.....	9	—	—	12	2
Narcotics.....	—	—	—	—	1
Perjury.....	1	—	—	—	—
Rape.....	21	2	6	3	5

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court.....	3	Pending
Bond Validation Proceedings (Appealed Supreme Court).....	14	Validated
Appeals Supreme Court (Other than Bond Validation Proceedings).....	2	—
Bastardy Proceedings.....	5	2 Final Judgments 2 Dismissed 1 Settled Open Court
Deaths Investigated—Accidental.....	17	—
Deaths Investigated—Alcoholism.....	7	—
Deaths Investigated—Natural Causes.....	28	—
Deaths Investigated—Unknown Causes.....	3	—
Declaratory Judgment (Beverage).....	1	—
Declaratory Judgment (Affecting Employees Civil Service).....	1	—
Disbarment Proceedings.....	1	Pending
Drownings Investigated—Accidental.....	3	—
Drownings Investigated—Found.....	4	—
Gambling—Injunctions.....	4	3 Granted; 1 Pending
Extraditions (Hearings Attended).....	2	—
Habeas Corpus Proceedings Attended.....	36	—
Homicide Investigated—Second Degree Murder Coroner's Verdict.....	1	—



Homicides Investigated — Manslaughter		
Coroner's Verdict .....	5	—
Homicides Investigated—Justifiable		
Homicide Coroner's Verdict .....	23	—
Parole Commission Reports Sent In .....	14	—
Rapes Investigated .....	10	Dismissed
Rape Investigated .....	1	Accused Not Apprehended
Sanity Matters (Restoration, etc.)		
Attended .....	36	—
Suicide Attempt Investigated .....	1	—
Suicides Investigated .....	59	—
Tax Foreclosures .....	3	Pending

Respectfully submitted,

STANLEY MILLEDGE,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>MONROE:</b>					
Homicide: .....	—	1	—	—	—
Murder, First Degree .....	4	3	—	1	—
Murder, Second Degree .....	—	—	—	1	—
Manslaughter .....	—	—	—	1	—
Rape .....	1	—	—	—	—
Justifiable Homicide (Coroner's Verdict) .....	—	—	—	—	1

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings (Appealed Supreme Court) .....	2	Validated
Habeas Corpus Hearings Attended .....	3	—
Injunction—Cave Inn Bar—Public Nuisance .....	1	—
Monroe County Audit Report—Attended Discussion Parole Commission Reports Sent In .....	3	—

Respectfully submitted,

STANLEY MILLEDGE,  
State Attorney.

## TWELFTH JUDICIAL CIRCUIT

Charlotte County	Hendry County
Collier County	Lee County
DeSoto County	Manatee County
Glades County	Sarasota County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>CHARLOTTE:</b>					
Aggravated Assault .....	1	—	—	1	—
Breaking and Entering .....	6	—	—	6	—
Homicide:					
Manslaughter .....	1	—	—	1	—
Larceny .....	2	—	—	1	—

Narcotics .....	1	—	—	1	—
Nonsupport or Desertion .....	1	—	—	—	—
Worthless Checks and Drafts .....	1	—	—	2	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court .....	2	—
Criminal Hearings Attended .....	13	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
COLLIER:					
Adultery .....	1	—	—	1	—
Assault with Intent to Commit a Felony .....	1	—	—	1	—
Breaking and Entering .....	2	3	—	4	—
Homicide:					
Murder, First Degree .....	1	—	—	1	—
Larceny .....	1	—	—	—	—
Resisting Arrest .....	6	—	—	4	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended .....	11	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
DESOTO:					
Adultery .....	2	—	1	—	1
Assault with Intent to Commit a Felony .....	7	3	—	4	—
Attempt to Commit a Felony .....	1	—	—	1	—
Bigamy .....	2	—	—	1	—
Breaking and Entering .....	7	—	—	7	—
Bribery .....	1	1	1	—	—
Exacting Bribe .....	1	—	—	—	—
False Pretense .....	2	—	—	2	—
Forgery .....	4	—	—	3	1
Fourth Conviction of Felony .....	1	—	—	—	—
Gambling Houses .....	1	—	—	1	—
Homicide:					
Manslaughter .....	2	—	1	1	—
Killing Unborn Child .....	1	—	1	—	—
Larceny .....	5	—	—	3	—
Nonsupport or Desertion .....	—	4	—	—	—
Rape .....	3	—	—	—	—
Receiving Stolen Property .....	5	—	—	5	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Estreature Proceedings.....	1	Judgment
Criminal Hearings Attended.....	31	—
Habeas Corpus Hearings Attended.....	2	1 Discharged 1 Remanded

\* Dismissed.

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
GLADES:					
Aggravated Assault .....	1	—	—	1	—
Breaking and Entering.....	4	—	—	3	—
Game and Fish Law Violations.....	1	—	—	1	—
Homicide:					
Murder, Second Degree.....	1	—	—	—	1
Larceny .....	2	—	—	2	—
Selling Liquor to Indians.....	1	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	15	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
HENDRY:					
Attempt to Commit a Felony.....	1	—	—	1	—
Breaking and Entering .....	10	—	—	8	—
Homicide:					
Murder, Second Degree .....	5	—	—	4	—
Manslaughter .....	2	—	—	2	—
Larceny .....	5	—	—	3	—
Liquor .....	1	—	—	1	—
Malicious Injury to Property.....	1	—	—	1	—
Selling Liquor to Indians.....	1	—	—	1	—
Worthless Checks and Drafts.....	1	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings .....	1	—
Criminal Hearings Attended.....	28	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>LEE:</b>					
Assault with Intent to Commit a Felony	11	—	1	9	—
Attempt to Commit a Felony	1	—	—	—	—
Bigamy	1	—	—	1	—
Breaking and Entering	14	—	1	14	—
Bribery	1	—	—	—	1
Carnal Intercourse with Unmarried Female	2	—	—	—	—
Embezzlement	3	—	—	1	—
Gambling Houses	3	—	—	—	—
<b>Homicide:</b>					
Murder, Second Degree	2	—	—	1	1
Manslaughter	2	—	—	2	—
Larceny	22	—	—	19	1
Liquor	2	—	1	1	—
Receiving Stolen Property	4	—	—	—	—
Robbery	4	—	—	2	—
Worthless Checks and Drafts	3	—	—	3	—

**OTHER CASES HANDLED**

	Number	Disposition
Bond Estreature Proceedings	2	Collected
Criminal Hearings Attended	44	9 Completed
Other Cases Not Enumerated	2	—
Habeas Corpus Hearings Attended	12	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>MANATEE:</b>					
Bigamy	2	—	—	—	—
Breaking and Entering	18	—	1	15	—
Conducting Lottery	3	—	—	2	—
Crime Against Nature	2	—	—	1	—
Embezzlement	2	—	—	1	—
Forgery	4	—	1	2	—
<b>Homicide:</b>					
Murder, First Degree	2	—	—	1	—
Murder, Second Degree	4	3	—	3	1
Larceny	6	—	1	3	1
Nonsupport or Desertion	10	—	—	10	—
Receiving Stolen Property	14	—	1	9	2

**OTHER CASES HANDLED**

	Number	Disposition
Criminal Hearings Attended	74	—
Habeas Corpus Hearings Attended	3	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

**SARASOTA:**

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Adultery	1	—	—	1	—
Arson	1	—	—	1	—
Assault with Intent to Commit a Felony	4	—	—	2	1
Attempt to Commit a Felony	2	—	—	—	—
Bigamy	1	—	1	—	—
Breaking and Entering	26	—	3	23	—
Embezzlement	1	—	—	1	—
False Pretense	4	—	—	4	—
Forgery	4	—	—	3	—
Homicide:					
Murder, First Degree	4	—	—	2	1
Murder, Second Degree	4	—	—	2	2
Manslaughter	1	—	—	1	—
Larceny	19	—	1	16	1
Nonsupport or Desertion	5	—	—	5	—
Robbery	1	—	—	1	—
Worthless Checks and Drafts	1	—	1	—	—

**OTHER CASES HANDLED**

	Number	Disposition
Appeals from Lower Court to Circuit Court	1	—
Bond Validation Proceedings	3	—
Criminal Hearings Attended	65	—
Habeas Corpus Proceedings Attended	16	—
Other Cases Not Enumerated	6	—

Respectfully submitted,

CLYDE H. WILSON,  
State Attorney.

**THIRTEENTH JUDICIAL CIRCUIT****Hillsborough County****HILLSBOROUGH:**

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Assault and Battery (On an indictment for rape)	—	—	—	4	—
Assault with Intent to Commit Rape	—	—	—	3	—
Homicide:	26	1	—	—	—
Murder, First Degree	—	—	—	7	1
Murder, Second Degree	—	—	—	19	—
Manslaughter	—	—	—	2	—
Rape	4	—	—	2	—

**OTHER CASES HANDLED**

	Number	Disposition
Bond Validation Proceedings	18	—
Habeas Corpus Hearings Attended	33	—
Restoration to Sanity	37	—

Respectfully submitted,

J. REX FARRIOR,  
State Attorney.



## FOURTEENTH JUDICIAL CIRCUIT

Bay County  
Calhoun County  
Gulf County

Holmes County  
Jackson County  
Washington County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>BAY:</b>					
Adultery	3	6	—	—	—
Aggravated Assault	5	2	—	2	2
Aiding an Escape	4	—	—	—	—
Arson	2	2	—	3	—
Assault with Intent to Commit a Felony	11	12	—	6	5
Bigamy	3	9	3	1	—
Breaking and Entering	38	8	5	15	6
Crime Against Nature	2	1	2	—	—
Embezzlement	2	4	—	1	1
False Pretense	—	3	—	—	—
Forgery	6	3	1	4	—
Hit and Run Driving	5	3	3	1	—
Homicide:					
Murder, First Degree	6	1	—	5	—
Murder, Second Degree	3	2	1	2	—
Manslaughter	2	4	—	—	2
Larceny	41	32	7	22	8
Mayhem	1	—	—	1	—
Nonsupport or Desertion	20	13	3	2	—
Perjury	16	4	4	—	2
Rape	5	1	—	—	5
Receiving Stolen Property	2	2	1	—	—
Removing Mortgaged Property	6	—	—	—	—
Resisting Officer	3	—	—	—	—
Robbery	7	5	2	3	—
Unlawful Sexual Intercourse	1	—	—	—	—
Violating Narcotic Law	2	—	—	—	2

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Criminal Hearings Attended	5	—
Habeas Corpus Hearings Attended	3	—
Other Cases Not Enumerated	3	—

Respectfully submitted,

L. D. McRAE,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>CALHOUN:</b>					
Aggravated Assault	3	—	1	2	—
Assault with Intent to Commit a Felony	2	—	—	2	—
Breaking and Entering	2	—	1	1	—

## Homicide:

Murder, First Degree	1	—	1	—	—
Larceny	2	—	—	1	1
Nonsupport or Desertion	6	—	1	5	—
Robbery	3	—	—	3	—
Unlawfully Burning Woods	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Validation Proceedings	2	—
Criminal Hearings Attended	3	—
Habeas Corpus Hearings Attended	1	—
Respectfully submitted,		

L. D. McRAE,  
State Attorney.

## GULF:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Aggravated Assault	1	—	—	1	—
Assault with Intent to Commit a Felony	4	—	1	1	2
Breaking and Entering	2	—	—	1	—
Destroying Personal Property	1	—	—	—	1
Hit and Run Driving	1	—	—	1	—
Homicide:					
Murder, First Degree	1	—	—	1	—
Murder, Second Degree	2	—	—	1	—
Manslaughter	2	—	—	2	—
Incest	3	1	—	—	2
Nonsupport or Desertion	1	—	—	—	1
Robbery	2	1	—	2	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	4	—
Respectfully submitted,		

L. D. McRAE,  
State Attorney.

## HOLMES:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Aggravated Assault	1	—	—	1	—
Arson	3	—	1	2	1
Assault with Intent to Commit a Felony	2	—	—	—	—
Bigamy	2	—	—	1	—
Breaking and Entering	7	—	4	2	—
Embezzlement	1	—	1	—	—
Hit and Run Driving	1	—	—	1	—
Homicide:					
Murder, First Degree	3	—	—	1	1
Murder, Second Degree	1	—	—	—	—
Manslaughter	—	—	—	1	—
Larceny	3	—	1	—	2
Nonsupport or Desertion	1	—	1	—	—
Robbery	1	—	1	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	8	—
Respectfully submitted,		
	L. D. McRAE,	State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>JACKSON:</b>					
Adultery	—	1	—	—	—
Aggravated Assault	5	—	1	3	—
Assault with Intent to Commit a Felony	7	—	3	1	3
Breaking and Entering	22	1	3	17	1
Carnal Intercourse with Unmarried Female	1	—	1	—	—
Disposing of Mortgaged Property	1	—	1	—	—
Embezzlement	1	—	—	—	1
Forgery	7	—	—	5	—
Hit and Run Driving	1	—	1	—	—
Homicide:					
Murder, First Degree	3	—	—	2	—
Manslaughter	4	—	—	—	2
Larceny	13	3	7	6	2
Mayhem	1	—	—	—	1
Nonsupport or Desertion	12	2	1	6	2
Obstructing Officer	1	—	—	1	—
Rape	7	—	3	2	2
Receiving Stolen Property	2	—	—	1	1
Recruiting Labor	2	—	2	—	—
Robbery	4	—	—	4	—
Throwing Missile	1	—	—	—	1
Unlawful Practice, Medicine	3	1	1	—	—
Buggery	2	—	1	1	—
Unlawful Sexual Intercourse	1	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court	7	—
Criminal Hearings Attended	5	—
Habeas Corpus Hearings Attended	1	—
Respectfully submitted,		

L. D. McRAE,  
State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>WASHINGTON:</b>					
Adultery	1	—	1	—	—
Aggravated Assault	5	—	—	3	1
Assault with Intent to Commit a Felony	6	—	—	3	—
Bigamy	8	—	3	5	—
Breaking and Entering	12	—	1	6	2

Burning Woods .....	1	—	—	1	—
Homicide:					
Murder, First Degree .....	1	—	—	1	—
Larceny .....	4	—	—	3	—
Nonsupport or Desertion .....	4	—	—	3	—
Rape .....	2	—	1	1	—
Receiving Stolen Property .....	1	—	1	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended .....	8	—
Respectfully submitted,		
	L. D. McRAE,	State Attorney.

## FIFTEENTH JUDICIAL CIRCUIT

## Broward County

## Palm Beach County

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>BROWARD:</b>					
Arson .....	1	—	—	1	—
Assault with Intent to Commit a Felony .....	4	—	1	3	—
Attempt to Commit a Felony .....	1	—	—	1	—
Breaking and Entering .....	15	—	—	15	—
Crime Against Nature .....	1	—	—	1	—
Embezzlement .....	3	—	1	2	—
False Pretense .....	1	—	—	—	1
Forgery .....	2	—	—	2	—
Homicide:					
Murder, First Degree .....	7	1	—	3	2
Murder, Second Degree .....	1	—	—	1	*2
Manslaughter .....	—	2	—	—	—
Larceny .....	14	—	—	13	*1
Misdemeanor .....	1	—	—	—	—
Rape .....	2	1	—	1	1
Receiving Stolen Property .....	2	—	—	1	*1
Robbery .....	1	—	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Appeals from Lower Court to Circuit Court .....	2	1 Reversed; 1 Sustained
Bond Validation Proceedings .....	3	Bonds Validated
Criminal Hearings Attended .....	32	13 Dismissed 19 Bound Over
Disbarment Proceedings .....	1	Disbarred
Habeas Corpus Hearings Attended .....	4	Remanded
Restoration of Sanity .....	4	Restored
Inquests Attended .....	2	

\* Pending.

Respectfully submitted,

LOUIS F. MAIRE,  
Assistant State Attorney.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>PALM BEACH:</b>					
Aggravated Assault .....	*1	—	—	—	—
Assault with Intent to Commit Rape .....	1	—	—	—	—
<b>Homicide:</b>					
Murder, First Degree .....	12	7	—	7	3
Murder, Second Degree .....	*5	—	—	—	†2
Rape .....	1	—	—	1	—

## OTHER CASES HANDLED

	Number	Disposition
Accidental Burning to Death in Building Investigated .....	3	—
Accidental Drownings Investigated .....	7	—
Automobile Collision Homicides Transferred to Criminal Court .....	6	—
Bond Validation Proceedings .....	7	5 Approved Circuit Court
		2 Appealed
		1 Reversed
Criminal Hearings Attended .....	5	Bound Over
Coroners Inquest .....	5	—
Habeas Corpus Hearings Attended .....	5	4 Remanded
		1 Discharged
Homicides Transferred to Criminal Court for Trial Second Degree .....	2	—
Investigation of Natural Deaths not Attended by Physician to Determine Cause of Death .....	22	—
Killed by Ry. Train Investigated .....	3	—
Miscellaneous Accidental Homicides .....	2	—
Murder and Suicide .....	2	—
Murder No Eyewitnesses, Suspect Not Determined .....	3	—
<b>Other Cases Not Enumerated:</b>		
Turned Over to Military—Murder First Degree .....	1	—
Miscellaneous .....	3	—
Rape .....	1	—
Self-Destruction by Weapons .....	5	—
Seven Year Old Girl Killing Playmate 9 with Pen-knife .....	1	To Juvenile Court

\* Transferred Criminal Court.  
† Mistrial.

Respectfully submitted,

SIDNEY J. CATTS, JR.,  
State Attorney.



## REPORTS OF COUNTY SOLICITORS FOR YEARS 1943-1944, INCLUSIVE

	Cases Filed Include Justice Cases	No Informations Returned by Solicitor	Nolle Prosequi	Convictions and Pleas	Acquittals
DADE:					
CRIMINAL COURT OF RECORD AND COURT OF CRIMES:					
OFFENSE					
Abortion	7	—	2	3	3
Adultery and Fornication	5	1	4	11	—
Aggravated Assault	132	5	40	52	20
Arson	1	1	—	1	—
Assault & Battery	162	6	60	53	27
Assault to Commit a Felony	67	4	25	24	12
Bigamy	13	2	3	8	—
Breaking and Entering	607	10	94	513	15
Contempt	4	—	—	3	1
Contributing to Delinquency of Minor	31	1	6	13	3
Crime Against Nature	31	—	8	20	2
Drunken Driving	108	2	13	70	5
Drunkenness	234	7	20	161	6
Embezzlement	91	1	32	47	6
False Pretenses	8	2	6	—	—
Forgery	45	1	12	19	15
Gambling and Gambling Houses	124	3	9	108	6
Game Law Violation	46	—	2	32	1
Homicide:					
Murder, Second Degree	6	—	4	2	—
Manslaughter	18	1	4	6	8
Incest	4	—	2	2	—
Indecent Assault on Child	13	—	1	11	1
Indecent Exposure	3	—	1	2	—
Larceny	601	16	113	434	38
Libel and Defamation	2	1	—	2	—
Licenses Occupational	23	—	4	7	4
Lien Laws	7	—	3	—	1
Liquor	190	—	53	123	2
Lottery	40	—	—	33	10
Malicious Mischief	23	1	5	7	1
Miscellaneous	304	19	75	189	35
Motor Vehicle Laws	285	3	37	184	6
Narcotics	68	—	13	57	—
Nonsupport or Desertion	37	3	23	12	1
Nuisance	1	—	—	—	1
Perjury	2	—	1	1	—
Prostitution	16	—	5	10	1
Rape	9	2	3	2	2
Receiving Stolen Property	69	3	17	48	10
Reckless Driving	178	2	13	120	3
Robbery	88	4	29	54	6
Slot Machines	35	—	13	17	2
Trespass	24	—	6	6	4
Vagrancy	202	9	35	114	10
Venereal Disease	159	—	10	124	13

Weapons .....	38	7	8	15	—
Worthless Checks and Drafts .....	82	—	39	37	—
Zoning and Sanitary .....	75	1	41	14	—

## OTHER CASES HANDLED

	Number	Disposition
Bond Estreatures .....	54	—
Extradition Hearings Attended .....	4	—
Felony Appeals to Supreme Court .....	10	—
Habeas Corpus Appeals to Supreme Court .....	3	—
Habeas Corpus Hearings Attended .....	7	—
Hearings Before Pardon Board .....	1	—
Misdemeanor Appeals to Circuit Court .....	3	—
Suspense file .....	34	—
Transferred Juvenile Court .....	32	—

Respectfully submitted,

ROBERT R. TAYLOR,  
County Solicitor.

## DUVAL:

## CRIMINAL COURT OF RECORD:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Adultery .....	2	3	2	—	—
Aggravated Assault .....	84	2	2	81	1
Arson .....	2	—	2	—	—
Assault and Battery .....	116	20	26	87	3
Assault with Intent to Commit a Felony .....	60	10	28	21	11
Attempt to Commit a Felony .....	—	1	—	—	—
Bigamy .....	1	2	—	1	—
Breaking and Entering .....	204	16	11	184	9
Careless and Reckless Driving, etc. ....	424	10	19	404	1
Carnal Intercourse with Unmarried Female .....	5	—	1	4	—
Crime Against Nature .....	7	3	—	7	—
Drunken Driving .....	143	1	2	132	9
Drunkenness .....	331	81	7	323	1
Embezzlement .....	—	14	—	—	—
False Pretense .....	10	4	1	9	—
Forgery .....	41	1	2	39	—
Gambling Houses .....	—	7	—	—	—
Game Law Violations .....	16	4	—	16	—
Homicide:					
Murder, Second Degree .....	11	—	1	8	2
Manslaughter .....	10	1	—	7	3
Incest .....	—	1	—	—	—
Larceny .....	559	22	46	495	18
Liquor .....	10	3	—	9	1
Lottery .....	18	—	3	15	—
Mayhem .....	—	1	—	—	—
Narcotics .....	28	—	—	28	—
Nonsupport or Desertion .....	12	4	4	8	—
Receiving Stolen Property .....	22	—	—	20	2
Robbery .....	43	1	3	38	2
Worthless Checks and Drafts .....	20	3	1	19	—
Miscellaneous Crimes Not Otherwise Listed .....	—	81	—	—	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	17	Bound Over to Cr. Court
Habeas Corpus Hearings Attended.....	6	Writ Denied
Extradition .....	3	—

Respectfully submitted,

HARRY H. MARTIN,  
County Solicitor.

## ESCAMBIA:

## CRIMINAL COURT OF RECORD:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Aggravated Assault .....	61	10	11	40	4
Arson .....	2	—	1	1	—
Assault with Intent to Commit a Felony.....	28	—	6	18	2
Breaking and Entering .....	25	—	4	19	2
Carnal Intercourse with Unmarried Female.....	3	—	1	2	1
Embezzlement .....	3	—	1	2	—
False Pretense .....	5	—	2	1	2
Forgery .....	5	—	—	3	1
Homicide:					
Murder, Second Degree.....	9	—	—	5	2
Manslaughter .....	5	—	—	4	1
Incest .....	1	—	—	—	1
Larceny .....	140	—	19	108	11
Liquor .....	9	—	7	1	—
Mayhem .....	1	—	1	—	—
Nonsupport or Desertion.....	4	—	1	2	1
Perjury .....	3	—	1	3	1
Rape .....	27	—	7	20	—
Receiving Stolen Property.....	10	—	1	8	—
Worthless Checks and Drafts.....	3	—	1	2	—
Miscellaneous Crimes Not Otherwise Listed.....	704	—	26	670	15

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended.....	50	—
Habeas Corpus Hearings Attended .....	5	—
Other Cases Not Enumerated .....	15	—

Respectfully submitted,

FORSYTH CARO,  
County Solicitor.

## HILLSBOROUGH:

## CRIMINAL COURT OF RECORD:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Abortion .....	1	—	—	1	—
Adultery .....	4	—	—	3	—
Aggravated Assault .....	34	14	6	25	4
Arson .....	1	—	—	—	—
Assault, Bare .....	1	—	—	—	—
Assault, Simple .....	—	—	—	1	—
Assault and Battery .....	15	2	4	9	1

Assault to Murder	14	—	1	10	1
Assault with Intent to Commit a Felony	13	5	3	17	1
Bigamy	3	—	—	1	2
Breaking and Entering	112	3	5	109	5
Carnal Intercourse with Unmarried Female	5	—	2	1	—
Carrying Concealed Weapon	4	—	—	2	—
Child Labor Law Violations	1	—	—	—	—
Contributing to Delinquency of Minor	5	—	2	1	1
Crime Against Nature	5	1	—	4	—
Conspiracy	2	—	—	1	—
Destroying Property of Another	3	1	—	1	1
Driving While License Revoked	2	—	—	—	—
Driving Without Lights	1	—	—	—	—
Drunken Driving	103	8	2	74	14
Drunkenness	1118	90	15	826	15
Embezzlement	16	1	3	11	2
Entering Without Breaking	2	—	—	1	—
Escape	15	—	—	21	—
Exhibiting Deadly Weapon	2	—	—	2	—
Failure to Register as Known Criminal	1	—	—	1	—
False Pretense	3	1	—	2	—
Fish Law Violations	2	—	—	2	—
Forgery	7	—	1	5	—
Homicide:					
Murder, Second Degree	7	1	—	3	1
Manslaughter	6	1	—	1	2
Illegal Parking on Highway	3	—	—	—	1
Illegal Practice of Medicine	1	—	—	—	—
Illegal Sale of Used Watch	1	—	—	—	—
Incest	1	1	1	—	—
Indecent Exposure	1	—	—	1	—
Killing Animal	—	—	—	1	—
Larceny	142	13	8	112	15
Leaving Scene of Accident	3	—	1	—	—
Lewd and Lascivious Behavior	3	—	—	2	1
Liquor	2	1	—	1	1
Lottery	3	2	—	2	1
Marriage Law Violations	1	—	1	—	—
Mayhem	2	—	1	1	—
Narcotics	6	—	2	1	1
No Driver's License	6	—	—	1	—
Nonsupport or Desertion	1	27	—	—	—
Obtaining Money Under False Pretenses	1	—	—	—	—
Perjury	2	1	—	—	—
Possession of Moonshine	1	—	—	—	—
Profanity	2	—	—	2	1
Prostitution	12	1	—	4	4
Rape, Attempted	3	—	—	1	1
Receiving Stolen Property	13	1	7	1	5
Reckless Driving	63	4	2	34	3
Robbery	31	4	4	21	7
Subornation of Perjury	1	—	—	—	—
Taking and Using Car Without Owner's Consent	8	1	1	6	1
Traffic Violations	5	3	1	2	—
Trespass	4	—	—	1	—
Unemployment Compensation Law Violations	4	—	2	—	1
Vagrancy	31	17	2	26	2
Worthless Checks and Drafts	10	3	1	6	—

Respectfully submitted,

JOSEPH E. WILLIAMS,  
County Solicitor.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>MONROE:</b>					
<b>CRIMINAL COURT OF RECORD:</b>					
Aggravated Assault	21	—	3	14	4
Assault, Simple	5	—	1	3	1
Assault and Battery	48	—	4	40	4
Assault with Intent to Commit a Felony	4	—	1	3	—
Attempt to Commit a Felony	5	—	1	3	1
Breaking and Entering	11	—	1	8	2
Carnal Intercourse with Unmarried Female	2	—	1	1	—
Carrying Concealed Weapons and Dangerous Exhibition of Same	6	—	—	5	1
Conspiracy	1	—	1	—	—
Drunken Driving	25	—	2	17	6
Drunkenness	20	—	—	20	—
Embezzlement	2	—	—	2	—
False Pretense	6	—	1	4	1
Forgery	9	—	—	9	—
Gambling Houses and Setting up Games of Chance	34	—	2	32	—
<b>Homicide:</b>					
Manslaughter	3	—	—	1	2
Indecent Exposure	12	—	3	8	1
Larceny	31	—	2	23	6
Lewd Assault on a Minor Child	2	—	—	2	—
Lottery	1	—	—	1	—
No State Driver's License	90	—	6	81	3
No State Motor License Tag and Improper Licenses	35	—	3	28	4
Nonsupport or Desertion	5	—	1	4	—
Open Profanity, Trespass, Affrays, Malicious Mis- chief, Contributing to Delinquency of Minors, Doing Business Without a State License, Violating State Laws in Regards to Sale of Used Watches, and State Traffic Law Viola- tions	62	—	5	52	5
Possession of Slot Machines	2	—	—	1	1
Prostitution, and Keeping House of Ill Fame	7	—	—	6	1
Receiving Stolen Property	5	—	1	3	1
Reckless Driving	72	—	7	59	6
Resisting Arrest	2	—	—	2	—
Robbery	4	—	—	2	2
State Beauty Culture Law Violations	7	—	—	7	—
State Beverage Law Violations	16	—	1	15	—
Temporarily Using Personal Property of Another	10	—	1	8	1
Vagrancy	133	—	8	117	8
Worthless Checks and Drafts	9	—	3	6	—

Respectfully submitted,

ALLAN B. CLEARE, JR.,  
County Solicitor.



## ORANGE:

## CRIMINAL COURT OF RECORD:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Assault and Battery and Affray	37	—	—	36	1
Adultery	3	—	—	3	—
Aggravated Assault	30	—	—	28	2
Arson	1	—	—	1	—
Assault with Intent to Commit a Felony	7	—	—	7	—
Bigamy	1	—	—	1	—
Breaking and Entering	87	—	—	85	2
Concealed and Exh. Deadly Weapons	23	—	3	18	2
Conspiracy	1	—	—	1	—
Cont. to Delinquency of Children	1	—	—	1	—
Crime against Nature	2	—	—	2	—
Cul. Negligence	2	—	—	2	—
Cutting Fence	1	—	—	1	—
Discriminatory Pass. Rates	1	—	—	1	—
Doing Business without a License	6	—	—	6	—
Drunkenness	193	—	—	192	1
Embezzlement	7	—	—	6	1
Escape	6	—	—	6	—
False Pretense	1	—	—	1	—
Fish and Game Law Violations	18	—	—	16	2
Forgery	7	—	—	7	—
Gambling Houses and Gambling	21	—	—	21	—
Homicide:					
Murder, Second Degree	7	—	—	6	1
Manslaughter	2	—	—	2	—
Incest	2	—	—	2	—
Killing Cow	1	—	1	—	—
Larceny	117	—	4	113	—
Libel and Defamation	1	—	—	—	1
Liquor	14	—	—	12	2
Livestock Running at Large	1	—	—	1	—
Lottery	3	—	—	3	—
Malicious Injury to Personal Property	5	—	—	5	—
Narcotics	5	—	—	5	—
Nonsupport or Desertion	5	—	—	5	—
Open Profanity	4	—	—	3	1
Receiving Stolen Property	4	—	—	4	—
Resisting Officer	2	—	—	2	—
Robbery	1	—	—	1	—
Sexual Offenses	4	—	—	4	—
Small Loan Law Violations	1	—	—	1	—
Temp. use of Personal Property	16	—	—	16	—
Traffic Violations	703	—	3	684	16
Trespass	2	—	—	2	—
Unlawful Assembly	1	—	—	1	—
Vagrancy	1	—	—	1	—
Worthless Checks and Drafts	27	—	—	27	—

## OTHER CASES HANDLED

	Number	Disposition
Criminal Hearings Attended	32	Bound Over
Habeas Corpus Hearings Attended	10	Remanded

Respectfully submitted,

O. RAYMOND ELLARS,  
County Solicitor.

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
<b>PALM BEACH:</b>					
<b>CRIMINAL COURT OF RECORD:</b>					
Abortion	1	—	1	—	—
Accessory to Felony	5	—	2	2	—
Adultery	7	—	6	1	—
Aggravated Assault	62	—	22	76	2
Assault and Battery	26	—	8	19	2
Assault with Intent to Commit a Felony	88	—	22	34	2
Attempt to Commit a Felony	3	—	—	1	—
Beating Board Bill	2	—	—	1	—
Bigamy	3	—	1	2	—
Breaking and Entering	108	—	25	83	2
Breaking and Entering to Commit Rape	1	—	—	1	—
Concealed Weapons	10	—	1	8	—
Contempt	3	—	2	1	—
Crime Against Nature	8	—	1	5	1
Defrauding	1	—	—	—	—
Driving While License Revoked	2	—	—	2	—
Drunken Driving	54	—	3	48	—
Drunkenness	67	—	8	63	—
Embezzlement	17	—	4	12	—
Entering Without Breaking	4	—	1	3	—
Failure to Have Children in School	2	—	—	2	—
False Pretense	5	—	3	2	—
Forgery	11	—	1	7	—
Fourth Offender	1	—	—	1	—
Game and Fish Law Violations	46	—	5	22	6
Homicide:					
Murder, Second Degree	17	—	6	5	1
Manslaughter	8	—	1	6	1
Immoral Cases	5	—	—	2	—
Indecent Exposure	1	—	—	1	—
Killing Beast of Another	1	—	—	1	—
Larceny	157	—	28	119	5
Liquor	8	—	1	14	—
Making False Statements to Obtain Money					
Under Florida Compensation Law	2	—	2	2	—
Malicious Mischief	6	—	—	4	—
No Driver's License	61	—	5	71	1
Nonsupport or Desertion	35	—	13	20	—
Obstructing an Officer	5	—	—	2	—
Obtaining Money by Promise of Labor	1	—	—	1	—
Open Profanity	3	—	1	1	—
Perjury	1	—	1	—	—
Permitting Unauthorized Person to Drive	4	—	—	2	—
Probation Violations	1	—	—	1	—
Publishing Name of Raped Female	1	—	—	—	—
Receiving Stolen Property	14	—	4	9	—
Robbery	34	—	14	16	1
Shooting into Dwelling	1	—	1	1	—
Tag Violations	15	—	—	13	—
Taking Turtle Eggs	1	—	—	—	—
Temp. Using Property Without Consent	12	—	—	10	—
Threatening Communications	1	—	1	—	—
Traffic Violations	339	—	21	322	—
Trespass	1	—	—	1	—

Vagrancy	20	—	6	16	1
Violating R. R. Com. Laws	2	—	—	2	—
Worthless Checks and Drafts	15	—	3	17	—

Respectfully submitted,

W. E. ROEBUCK,  
County Solicitor.

## POLK:

## CRIMINAL COURT OF RECORD:

	Indictments and Informations	No True Bills and No Informations	Nolle Prosequi	Convictions	Acquittals
Abortion	1	—	—	—	—
Adultery	5	—	2	2	1
Affray	13	—	1	12	—
Aggravated Assault	82	—	5	66	8
Arson	2	—	—	1	1
Assault and Battery	101	—	7	84	5
Assault with Intent to Commit a Felony	34	—	4	28	1
Attempt to Commit a Felony	16	—	—	10	—
Basic Science Laws Violations	1	—	—	1	—
Beating Board Bill	4	—	—	4	—
Beating Train Ride	1	—	—	1	—
Bigamy	2	—	—	1	—
Breaking and Entering	89	—	3	67	5
Carnal Intercourse with Unmarried Female	4	—	—	3	1
Contributing to Delinquency of Minor	4	—	1	3	—
Crime Against Nature	5	—	1	3	—
Cruelty to Animals	1	—	—	1	—
Disturbing Worship	1	—	—	1	—
Drunken Driving	161	—	5	148	4
Drunkenness	993	—	7	907	3
Embezzlement	16	—	1	6	—
Escape	20	—	—	18	—
False Pretense	11	—	3	8	—
Fish and Game Law Violations	36	—	2	29	3
Forgery	8	—	—	7	—
Fornication	9	—	—	8	—
Gambling	48	—	1	42	1
Habitual Criminal Act	1	—	—	1	—
Illegal Exhibition of Weapons	1	—	—	1	—
Incest	2	—	—	1	—
Indecent Exposure	7	—	—	7	—
Larceny	80	—	4	59	7
Libel and Defamation	2	—	—	2	—
Liquor	83	—	2	71	11
Lottery	8	—	—	7	—
Malicious Destruction of Property	6	—	—	6	—
Manslaughter	7	—	—	5	2
Mayhem	1	—	—	1	—
Nonsupport or Desertion	26	—	2	17	—
Perjury	3	—	—	3	—
Possession of Slot Machine	7	—	—	6	1
Profanity	32	—	—	31	1
Prostitution	64	—	7	48	3
Rape, Statutory	2	—	—	1	1

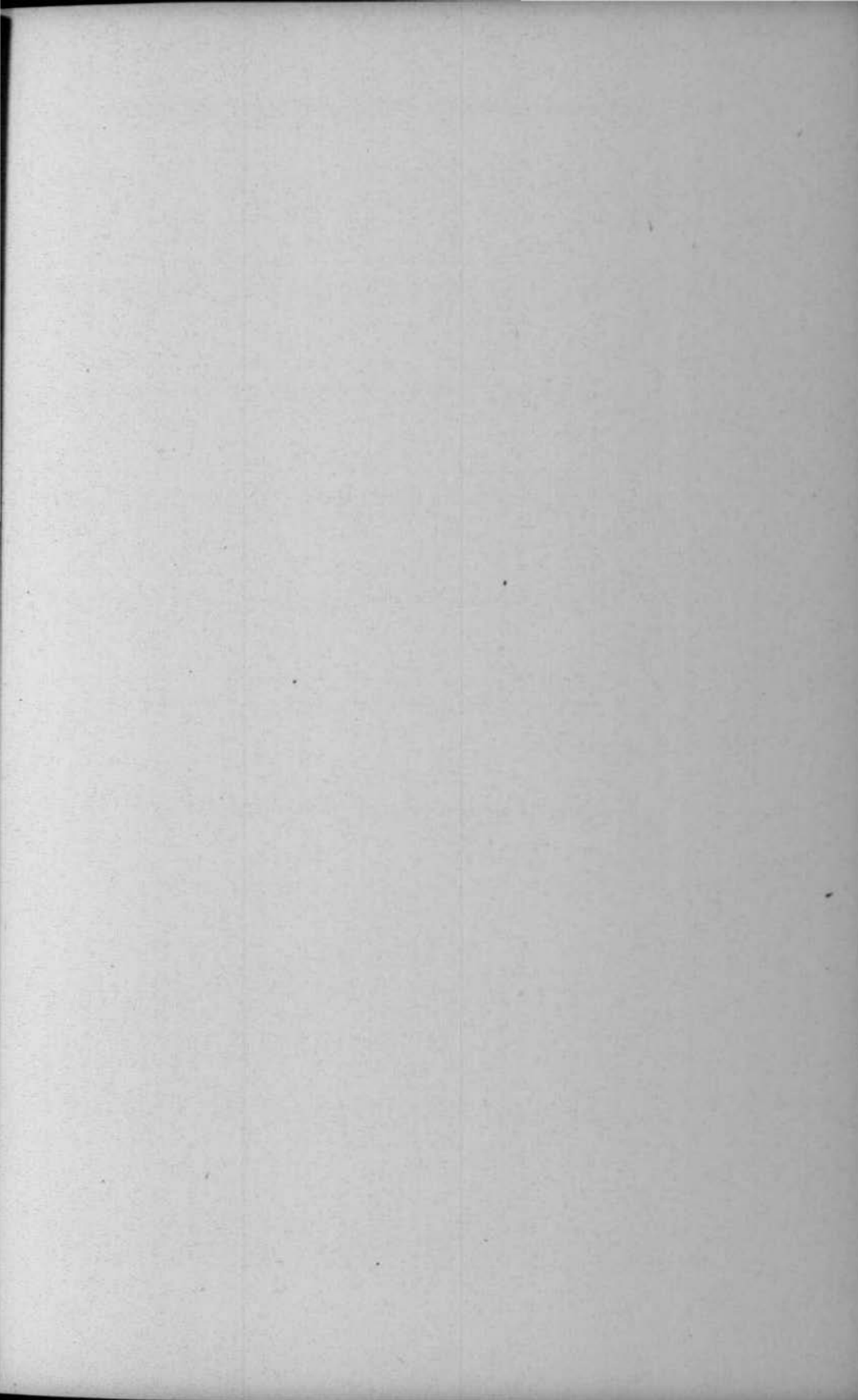
Receiving Stolen Property .....	8	—	—	7	—
Reckless Driving .....	207	—	3	149	1
Resisting Arrest .....	2	—	—	2	—
Robbery .....	6	—	—	5	1
Sale of Property Subject to Lien .....	1	—	—	1	—
School Law Violations .....	19	—	4	15	1
Shooting Into House .....	1	—	—	1	—
Sunday Laws Violations .....	10	—	—	9	1
Traffic Violations .....	403	—	6	351	3
Trespass .....	13	—	1	9	2
Vagrancy .....	221	—	5	198	5
Worthless Checks and Drafts .....	15	—	2	8	—

OTHER CASES HANDLED  
BY STATE ATTORNEYS

	Number	Disposition
Bond Estreature Proceedings—Cash Bonds .....	111	Cash Forfeited

Respectfully submitted,

**B. G. LANGSTON,**  
Acting County Solicitor.





COUNTY	CIRCUIT	NAME OF CLERK	Common Law Cases Undisposed of	Chancery Cases Un- disposed of	Common Law Cases Filed	Chancery Cases Filed	Common Law Cases Disposed of	Chancery Cases Disposed of	All Other Cases Disposed of
Alachua.....	8th	Geo. E. Evans.....	105	210	89	784	86	744	Inc. Others
Baker.....	8th	Joe Dobson.....	15	16	6	264	3	221	10
Bay.....	14th	W. S. Weaver.....	99	179	101	752	46	375	56
Bradford.....	8th	A. J. Thomas.....	9	54	38	1,184	24	1,002	27
Brevard.....	9th	G. M. Simmons.....	36	94	39	1,283	43	1,111	0
Broward.....	15th	Ted Cabot.....	691	459	140	914	154	708	—
Calhoun.....	14th	J. A. Peacock.....	20	81	7	197	8	145	10
Charlotte.....	12th	E. H. Scott.....	3	11	7	96	4	105	Inc. Others
Citrus.....	5th	James E. Connor.....	3	10	8	105	5	95	3
Clay.....	4th	R. L. Tilley.....	5	9	17	38	12	26	7
Collier.....	12th	Edmund F. Scott.....	19	6	3	8	2	5	0
Columbia.....	3rd	Hugh B. Summers.....	32	65	32	214	33	161	9
Dade.....	11th	E. B. Leatherman.....	237	2,500	425	11,814	300	10,091	Inc. Others
DeSoto.....	12th	Leslie E. Avant.....	6	38	14	129	5	106	18
Dixie.....	3rd	W. G. Jones, acting...	3	4	26	131	18	79	1
Duval.....	4th	Leonard W. Thomas.....	Not rep.	Not rep.	497	8,702	533	6,916	Inc. Chan.
Escambia.....	1st	Langley Bell.....	234	104	228	896	148	520	218
Flagler.....	7th	Dale B. Brown.....	8	25	7	124	5	107	—
Franklin.....	2nd	W. P. Dodd.....	2	4	16	89	10	86	7
Gadsden.....	2nd	F. F. Morgan.....	5	14	26	124	13	86	23
Gilchrist.....	8th	R. E. Davis.....	2	2	4	18	5	13	0
Glades.....	12th	Mrs. D. S. Weeks.....	3	0	1	55	3	54	—
Gulf.....	14th	J. R. Hunter.....	1	2	6	92	4	59	—
Hamilton.....	3rd	Miss Thelma Lewis.....	19	22	9	68	4	40	0
Hardee.....	10th	Ben Coker.....	23	31	27	580	13	500	—
Hendry.....	12th	Wm. T. Hull.....	2	0	10	54	6	44	0
Hernando.....	5th	H. C. Mickler.....	15	26	9	103	6	93	0
Highlands.....	10th	H. T. Pietz.....	593	631	27	487	29	407	14
Hillsborough.....	13th	Chas. H. Pent.....	159	1,483	405	5,043	246	3,560	Inc. Chan.
Holmes.....	14th	J. H. Little.....	8	3	13	113	5	85	4

Indian River...	9th	Douglas Baker.....	137	185	15	180	8	100	17
Jackson.....	14th	Doc Grant.....	45	129	47	457	32	319	58
Jefferson.....	2nd	Clyde H. Sauls.....	2	10	6	34	5	31	9
Lafayette.....	3rd	Sidney C. Edwards....	6	7	4	19	4	17	2
Lake.....	5th	Geo. J. Dykes.....	1,290	1,006	67	534	68	435	—
Lee.....	12th	D. T. Farabee.....	25	95	23	490	36	475	39
Leon.....	2nd	Geo. G. Crawford....	180	238	197	1,257	108	932	28
Levy.....	8th	Jack L. Meeks.....	39	83	20	82	23	71	7
Liberty.....	2nd	W. G. Larkins.....	1	4	15	29	16	25	1
Madison.....	3rd	D. F. Burnett, Jr....	122	59	13	149	6	143	—
Manatee.....	12th	Lloyd N. Hicks.....	Not rep.	Not rep.	89	475	33	363	—
Marion.....	5th	Carlyle Ausley.....	126	351	70	504	27	355	Inc. Others
Martin.....	9th	J. R. Pomeroy.....	15	28	36	135	24	112	0
Monroe.....	11th	Ross C. Sawyer.....	4	42	50	772	37	569	30
Nassau.....	4th	T. W. Brown.....	16	22	10	125	9	115	0
Okaloosa.....	1st	Leron W. Rice.....	25	38	56	409	36	367	31
Okcechobee.....	9th	Roy R. Raulerson....	4	4	7	65	3	49	—
Orange.....	9th	Clarence M. Gay.....	118	120	156	885	118	770	74
Osceola.....	9th	John L. Overstreet...	5	22	14	192	7	171	—
Palm Beach...	15th	J. Alex Arnette.....	270	1,254	276	1,930	116	765	40
Pasco.....	6th	A. J. Burnside.....	Not rep.	Not rep.	15	336	5	213	Inc. Others
Pinellas.....	6th	Ray E. Green.....	440	935	176	2,232	227	2,090	Inc. Others
Polk.....	10th	D. H. Sloan, Jr....	74	179	121	2,934	62	2,424	191
Putnam.....	7th	W. A. Williams, Jr....	10	16	31	272	16	220	21
St. Johns.....	7th	Oliver Lawton, acting.	Not rep.	Not rep.	33	587	37	466	Inc. Others
St. Lucie.....	9th	W. R. Lott.....	27	53	64	428	34	275	36
Santa Rosa.....	1st	Claude E. Locklin....	3	16	13	177	10	161	30
Sarasota.....	12th	W. A. Wynne.....	Not rep.	Not rep.	76	612	49	468	14
Seminole.....	9th	O. P. Herndon.....	52	273	29	708	15	568	Inc. Others
Sumter.....	5th	Roy Caruthers.....	50	125	7	206	3	163	11
Suwannee.....	3rd	J. L. McMullen.....	60	109	33	185	29	164	12
Taylor.....	3rd	Felix A. Parker.....	8	26	22	150	12	102	10
Union.....	8th	C. B. Hayes.....	13	12	1	44	5	40	3
Volusia.....	7th	Jess Mathas.....	1,000	3,200	500	2,680	110	889	Inc. Chan.
Wakulla.....	2nd	Gilbert J. Langston...	6	5	20	97	15	63	—
Walton.....	1st	Miss Kate Gillis.....	19	48	25	232	19	156	11
Washington...	14th	Eli J. Harrell.....	12	45	19	168	9	64	15

## REPORT OF CLERK OF CIVIL COURT OF RECORD DADE COUNTY

Number of common law cases filed during biennium 1943-1944..... 1,569  
 Number of common law cases disposed of during biennium 1943-1944 1,783  
 Respectfully submitted,

W. CECIL WATSON, Clerk.

## REPORT OF CLERK OF CIVIL COURT OF RECORD DUVAL COUNTY

Number of common law cases filed during biennium 1943-1944..... 1,415  
 Number of common law cases disposed of during biennium 1943-1944 880  
 Respectfully submitted,

C. A. HARTLEY, Clerk.

## REPORT OF CLERK OF COURT OF RECORD ESCAMBIA COUNTY

Number of common law cases on file and undisposed of January  
 1, 1943 ..... 85  
 Number of chancery cases on file and undisposed of January 1, 1943 270  
 Number of common law cases filed during the biennium of  
 1943-1944 ..... 191  
 Number of chancery cases filed during the biennium of 1943-1944... 1,688  
 Number of common law cases disposed of during the biennium of  
 1943-1944 ..... 93  
 Number of chancery cases disposed of during the biennium of  
 1943-1944 ..... 1,280

Respectfully submitted,

MRS. GEORGE TRAWICK, Acting Clerk.

## BOARDS, COMMISSIONS AND BUREAUS OF THE STATE OF FLORIDA

ACCOUNTANCY, STATE BOARD OF (See State Board of Accountancy)  
ADMINISTRATION, STATE BOARD OF (See State Board of Administration)

AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION (See Florida State Improvement Commission)

ARCHEOLOGIST, STATE (See State Archeologist)

### ARMORY BOARD

Composed of the governor, adjutant general, state quartermaster, general officers of the line and the officers who have attained the rank of colonel in the active national guard of this state (§250.48, Florida Statutes, 1941).

The powers and duties of the armory board are set out in §§250.48 and 250.49, Florida Statutes, 1941.

### BARBERS' SANITARY COMMISSION

Consists of three members appointed by the governor for terms of four years (§476.17, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 476, Florida Statutes, 1941.

BEAUTY CULTURE, STATE BOARD OF (See State Board of Beauty Culture)

BOARD, ARMORY (See Armory Board)

### BOARD FOR FIXING VALUES OF INVESTMENT SECURITIES OF TRUST COMPANIES

Composed of the comptroller, state treasurer and attorney general (§655.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §655.10, Florida Statutes, 1941.

### BOARD FOR LICENSING LABOR BUSINESS AGENTS

Composed of the governor, secretary of state and superintendent of education (§481.04, 1943 Supplement, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 481, 1943 Supplement, Florida Statutes, 1941.

### BOARD FOR SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES

Composed of the governor, comptroller, state treasurer and attorney general (§648.16, Florida Statutes, 1941).

The general powers and duties of the board are set out in §648.16, Florida Statutes, 1941.

BOARD OF ARCHITECTS, FLORIDA STATE (See Florida State Board of Architects)

### BOARD OF CHIROPODY EXAMINERS

Consists of three chiroprodists practicing in this state, and the secretary of the state board of medical examiners, who shall act as ex officio executive officer of the board. Members of the board are appointed by the governor for terms of three years (§461.05, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 461, Florida Statutes, 1941.

BOARD OF CHIROPRACTIC EXAMINERS, FLORIDA STATE (See Florida State Board of Chiropractic Examiners)

**BOARD OF COMMISSIONERS OF STATE INSTITUTIONS**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§17, article IV, Florida Constitution).

The general powers and duties of the commissioners are set out in §17, article IV, Florida Constitution, §§225.02 and chapters 135, 283, 393, 394, 409, 954, 955 and 956, Florida Statutes, 1941.

**BOARD OF CONTROL**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida, one from Middle South Florida, who have been residents of Florida for ten years, appointed by the governor for four years (§240.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 240, Florida Statutes, 1941.

**BOARD OF DRAINAGE COMMISSIONERS**

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§298.69, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§298.69-298.73, Florida Statutes, 1941.

**BOARD OF ENGINEER EXAMINERS**

Consists of five members, appointed by the governor, for terms of four years (§471.08, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 471, 472, Florida Statutes, 1941.

**BOARD OF EXAMINERS IN THE BASIC SCIENCES**

Consists of five members, appointed by the governor for terms of four years (456.07, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 456, Florida Statutes, 1941.

**BOARD OF FINANCE**

Consists of the governor, state treasurer and comptroller (§18.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§18.10-18.16, Florida Statutes, 1941.

**BOARD OF HEALTH, STATE (See State Board of Health)****BOARD OF MEDICAL EXAMINERS**

Composed of ten practicing physicians, residents of this state, appointed by the governor for terms of four years (§§458.01 and 458.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 458, Florida Statutes, 1941 and 1943 Supplement, Florida Statutes, 1941.

**BOARD OF OPTOMETRY, FLORIDA STATE (See Florida State Board of Optometry)****BOARD OF PARDONS**

Composed of the governor, secretary of state, attorney general, comptroller and commissioner of agriculture (§12, article IV, Florida Constitution).

The general powers and duties of the board are set out in §12, article IV, Florida Constitution.

**BOARD OF PHARMACY FOR THE STATE OF FLORIDA**

Consists of five persons, pharmacists of the state, appointed by the governor for terms of four years (§465.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 465, Florida Statutes, 1941.



**BOARD OF PHOTOGRAPHIC EXAMINERS**

Consists of five members, appointed by the governor, for terms of three years (§478.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 478, Florida Statutes, 1941.

**BOARD OF TRUSTEES OF TEACHERS' RETIREMENT SYSTEM**

Composed of the governor, secretary of state, attorney general, state treasurer, superintendent of public instruction and two teacher members to be appointed by the governor for terms of three years (§238.03, Florida Statutes, 1941).

The powers and duties, and the qualifications of the teacher members, of the board are set out in §§238.03-238.16, Florida Statutes, 1941.

**BOARD OF VETERINARY EXAMINERS**

Consists of three licensed graduate veterinarians, appointed by the governor for terms of four years (§474.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 474, Florida Statutes, 1941.

**BOARD TO NAME TEACHERS FOR SUMMER SCHOOLS**

Composed of the presidents of the University of Florida, and the Florida State College for Women and of the superintendent of public instruction (§239.14, Florida Statutes, 1941).

The powers and duties of the board are set out in §239.14, Florida Statutes, 1941.

**BOARD, STATE HOUSING (See State Housing Board)****BUDGET COMMISSION, STATE (See State Budget Commission)****BUREAU, MARKETING (See Marketing Bureau)****BUREAU OF IMMIGRATION**

The bureau of immigration is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution and §19.25, Florida Statutes, 1941).

The powers and duties of the bureau of immigration are set out in §26, article IV, Florida Constitution and §§19.25-19.28, Florida Statutes, 1941.

**BUREAU OF INSPECTION**

The bureau of inspection is under the direction and supervision of the commissioner of agriculture (§19.47, Florida Statutes, 1941).

The powers and duties of the bureau of inspection are set out in §§19.47-19.53, Florida Statutes, 1941.

**BUREAU OF VITAL STATISTICS**

This bureau is under the direction of the state board of health, which is composed of three members appointed by the governor, for terms of four years (§§381.01 and 382.02, Florida Statutes, 1941).

The general powers and duties of the bureau are set out in chapter 382, Florida Statutes, 1941, and 1943 Supplement, Florida Statutes, 1941.

**CABINET, GOVERNOR'S (See Governor's Cabinet)****CHIROPODY EXAMINERS, BOARD OF (See Board of Chiropractic Examiners)****CITRUS COMMISSION, FLORIDA (See Florida Citrus Commission)****COMMISSION, BARBERS' SANITARY (See Barbers' Sanitary Commission)****COMMISSION, CONSTITUTIONAL MONUMENT PARK (See Constitutional Monument Park Commission)**

COMMISSION, DIRECT TAX (See Direct Tax Commission)

COMMISSION, EVERGLADES NATIONAL PARK (See Everglades National Park Commission)

COMMISSION, FLORIDA CENTENNIAL (See Florida Centennial Commission)

COMMISSION, FLORIDA STATE IMPROVEMENT (See Florida State Improvement Commission)

COMMISSION, GAME AND FRESH WATER FISH (See Game and Fresh Water Fish Commission)

COMMISSION, HOTEL (See Hotel Commission)

COMMISSION, MILK (See Milk Commission)

COMMISSION, PAROLE (See Parole Commission)

COMMISSION, STATE RAILROAD (See State Railroad Commission)

COMMISSION, SECURITIES (See Securities Commission)

COMMISSIONER, INSURANCE (See Insurance Commissioner)

COMMISSIONER OF REVENUE (Inheritance taxes)

The comptroller of the State of Florida is designated as commissioner of revenue (§198.05, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 198, Florida Statutes, 1941.

COMMISSIONERS OF STATE INSTITUTIONS, BOARD OF (See Board of Commissioners of State Institutions)

COMMISSIONERS ON UNIFORM STATE LAWS

Composed of three commissioners to be appointed by the governor for terms of four years (§11.01, Florida Statutes, 1941).

The powers, duties and qualifications of the commissioners are set out in §11.01, Florida Statutes, 1941.

COMMITTEE, TEXTBOOK RATING (See Textbook Rating Committee)

COMMITTEE FOR DEPOSITING STATE FUNDS (See Board of Finance)

COMMITTEE ON COURSES OF STUDY

Composed of nine members appointed by the state board of education upon the recommendation of the superintendent of public instruction, for terms of four years (§233.01, Florida Statutes, 1941).

The powers, duties and qualifications of the committee are set out in chapter 233, Florida Statutes, 1941.

CONSERVATION, STATE BOARD OF (See State Board of Conservation)

CONSERVATION BOARD, STATE SOIL (See State Soil Conservation Board)

CONSTITUTIONAL MONUMENT PARK COMMISSION

Composed of the governor, secretary of state and one other person to be appointed by the governor, the term of office of appointee not being fixed (§265.08, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.08, 265.09, 265.14 and 265.15, Florida Statutes, 1941.

CONTROL, BOARD OF (See Board of Control)

COURSES OF STUDY, COMMITTEE ON (See Committee on Courses of Study)

CRIPPLED CHILDREN'S COMMISSION, FLORIDA (See Florida Crippled Children's Commission)

**DADE MEMORIAL COMMISSION**

Composed of three members appointed by the governor for terms of four years (§258.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§258.02-258.07, Florida Statutes, 1941.

DEFENSE COUNCIL, FLORIDA STATE (See Florida State Defense Council)

DENTAL EXAMINERS, FLORIDA STATE BOARD OF (See Florida State Board of Dental Examiners)

DEPARTMENT, STATE AUDITING (See State Auditing Department)

DEPARTMENT, STATE BEVERAGE (See State Beverage Department)

DEPARTMENT, STATE ROAD (See State Road Department)

DEPARTMENT, STATUTORY REVISION (See Statutory Revision Department)

**DEPARTMENT OF PUBLIC SAFETY**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§321.01, Florida Statutes, 1941.)

The general powers and duties of the department are set out in chapters 321 and 322, Florida Statutes, 1941.

DEPOSITING STATE FUNDS, COMMITTEE FOR (See Committee for Depositing State Funds)

**DIRECT TAX COMMISSION**

Composed of the governor, state treasurer and comptroller (§14.12, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §14.12, Florida Statutes, 1941.

DRAINAGE COMMISSIONERS, BOARD OF (See Board of Drainage Commissioners)

ECONOMIC ADVANCEMENT COUNCIL, FLORIDA (See Florida Economic Advancement Council)

EDUCATION, STATE BOARD OF (See State Board of Education)

ELECTION CANVASSERS, STATE BOARD OF (See State Board of Election Canvassers)

ENGINEER EXAMINERS, BOARD OF (See Board of Engineer Examiners)

**EVERGLADES NATIONAL PARK COMMISSION**

Composed of not less than twelve and not more than thirty members, to be appointed by the governor for a period of four years (§264.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 264, Florida Statutes, 1941, and §264.12, 1943 Supplement, Florida Statutes, 1941.

EXAMINERS FOR NURSES, STATE BOARD OF (See State Board of Examiners for Nurses)

EXAMINERS IN BASIC SCIENCES, BOARD OF (See Board of Examiners in Basic Sciences)

FIRE MARSHAL, STATE (See State Fire Marshal)

**FLORIDA BOARD OF FORESTRY**

Consists of five members, appointed by the governor, for terms of four years (§589.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 589, 590 and 591, Florida Statutes, 1941.

**FLORIDA BOARD OF MASSAGE**

Composed of three members appointed by the governor for terms of three years. The secretary of the state board of medical examiners shall act as an ex officio member of said board (§480.04, 1943 Supplement, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 480, 1943 Supplement, Florida Statutes, 1941.

**FLORIDA CENTENNIAL COMMISSION**

Consists of eleven members, two from each of the present congressional districts, and one from the state at large, appointed by the governor for terms of four years. The governor and the commissioner of agriculture are respectively, honorary chairman and honorary vice-chairman (§286.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 286, Florida Statutes, 1941.

**FLORIDA CITRUS COMMISSION**

Composed of eleven members appointed by the governor for terms of two years, such members to be practical citrus fruit men, resident citizens of the State of Florida, seven members of whom shall be growers not connected with any packing, shipping or marketing organization (§595.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 594, 595, et seq., Florida Statutes, 1941.

**FLORIDA CRIPPLED CHILDREN'S COMMISSION**

Composed of five members to be appointed by the governor for terms of four years (§391.02, Florida Statutes, 1941).

The powers, duties and qualifications of the commission are set out in chapter 391, Florida Statutes, 1941.

**FLORIDA ECONOMIC ADVANCEMENT COUNCIL**

Composed of the governor, secretary of state, commissioner of agriculture and attorney general (§120.01, 1943 Supplement, Florida Statutes, 1941).

The general powers and duties of the council are set out in chapter 120, 1943 Supplement, Florida Statutes, 1941.

**FLORIDA INDUSTRIAL COMMISSION**

Consists of three members appointed by the governor for terms of four years (§440.44, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 440 and 443, Florida Statutes, 1941.

**FLORIDA REAL ESTATE COMMISSION**

Consists of three persons, resident citizens of Florida, to be appointed by the governor for terms of three years (§475.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 475, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF ARCHITECTS**

Composed of five members who are architects, appointed by the governor for terms of four years (§467.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 467, Florida Statutes, 1941.



**FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS**

Composed of three members to be appointed by the governor for terms of three years and who shall be doctors of chiropractic, and who shall be bona fide residents of this state (§§460.01 and 460.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 460, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF DENTAL EXAMINERS**

Composed of five members, appointed by the governor for terms of four years (§466.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 466, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF OPTOMETRY**

Composed of five optometrists, residents of this state, appointed by the governor for terms of four years (§463.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 463, 1943 Supplement and Florida Statutes, 1941.

**FLORIDA STATE DEFENSE COUNCIL**

Composed of the governor, as chairman, the attorney general and adjutant general, as ex officio members, and other members (number not designated) to be appointed by the governor for terms not exceeding four years each, one of whom is designated by the governor as vice-chairman (§249.03, Florida Statutes, 1941).

The powers, duties and qualifications of the members of the council are set out in chapter 249, Florida Statutes, 1941.

**FLORIDA STATE IMPROVEMENT COMMISSION**

Composed of five members, one of whom shall be the governor, one of whom shall be the chairman of the state road department, the three other members to be appointed by the governor for terms of four years (§420.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 420, Florida Statutes, 1941.

Formerly the Agricultural and Industrial Relief Commission.

**FORESTRY, FLORIDA BOARD OF (See Florida Board of Forestry)****FUNERAL DIRECTORS AND EMBALMERS, STATE BOARD OF (See State Board of Funeral Directors and Embalmers)****GAME AND FRESH WATER FISH COMMISSION**

Consists of five members appointed by the governor for terms of five years (§30, article IV, Florida Constitution).

The general powers and duties of the commission are set out in the above section of the constitution and chapter 372, Florida Statutes, 1941, and the same chapter in the 1943 Supplement, Florida Statutes, 1941.

**GOVERNOR'S CABINET**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§20, article IV, Florida Constitution).

The general powers and duties of the governor's cabinet are set out in §20, article IV, Florida Constitution.

**HOTEL COMMISSION**

Consists of a commissioner, appointed by the governor, whose term of office runs concurrently with that of governor (§509.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 509, 510 and 511, Florida Statutes, 1941.

**IMMIGRATION, BUREAU OF (See Bureau of Immigration)****INDUSTRIAL COMMISSION, FLORIDA (See Florida Industrial Commission)**



INSPECTION, BUREAU OF (See Bureau of Inspection)

**INSURANCE COMMISSIONER**

The state treasurer is designated as insurance commissioner (§626.01, Florida Statutes, 1941).

The general powers and duties of the insurance commissioner are set out in chapters 625, 626, et seq., Florida Statutes, 1941.

INTERNAL IMPROVEMENT FUND, TRUSTEES OF THE (See Trustees of the Internal Improvement Fund)

INVESTMENT SECURITIES OF TRUST COMPANIES, BOARD FOR FIXING VALUES OF (See Board for Fixing Values of Investment Securities of Trust Companies)

**JUDAH P. BENJAMIN MEMORIAL COMMISSION**

Composed of three citizens of the state appointed by the governor, terms of office not stated (§265.10, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.10-265.12, Florida Statutes, 1941.

LABOR BUSINESS AGENTS, BOARD OF LICENSING (See Board of Licensing Labor Business Agents)

LAW EXAMINERS, STATE BOARD OF (See State Board of Law Examiners)

LIBRARY BOARD, STATE (See State Library Board)

LIVESTOCK SANITARY BOARD, STATE (See State Livestock Sanitary Board)

MARKETING BOARD, STATE AGRICULTURAL (See State Agricultural Marketing Board)

**MARKETING BUREAU**

Consists of a state marketing commissioner, appointed by the governor, upon recommendation of the commissioner of agriculture, for a term of two years (§603.01, Florida Statutes, 1941).

The general powers and duties of the bureau are set out in §603.09, Florida Statutes, 1941.

MASSAGE, FLORIDA BOARD OF (See Florida Board of Massage)

MEDICAL EXAMINERS, BOARD OF (See Board of Medical Examiners)

MEMORIAL COMMISSION, DADE (See Dade Memorial Commission)

MEMORIAL COMMISSION, JUDAH P. BENJAMIN (See Judah P. Benjamin Memorial Commission)

MEMORIAL, SPANISH WAR (See Spanish War Memorial)

MEMORIAL COMMISSION, STEPHEN FOSTER (See Stephen Foster Memorial Commission)

**MILK COMMISSION**

Consists of milk administrator, appointed by the governor for a term of four years, state health officer, a citizen not connected with the milk industry and three members of the milk industry; one a producer, one a distributor and one a producer-distributor appointed by the governor for terms of four years (§501.03, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 501, Florida Statutes, 1941.

MOTOR VEHICLE COMMISSIONER, STATE (See State Motor Vehicle Commissioner)

**NATUROPATHIC EXAMINERS, STATE BOARD OF** (See State Board of Naturopathic Examiners)

**NAVAL STORES, SUPERVISORY INSPECTOR OF** (See Supervisory Inspector of Naval Stores)

**OFFICE, PUBLIC LAND** (See Public Land Office)

**OSTEOPATHIC MEDICAL EXAMINERS, STATE BOARD OF** (See State Board of Osteopathic Medical Examiners)

**PARDONS, BOARD OF** (See Board of Pardons)

**PAROLE COMMISSION**

Consists of three citizens and residents of this state, appointed by the board of commissioners of state institutions, certified by said board to the senate for confirmation. The members of the commission are appointed for terms of six years (§§947.02 and 947.03, Florida Statutes, 1941; §32, article XVI, Florida Constitution).

The general powers and duties of the commission are set out in chapters 947 and 948, Florida Statutes, 1941 and 1943 Supplement, Florida Statutes, 1941; §32, article XVI, Florida Constitution.

**PENSIONS, STATE BOARD OF** (See State Board of Pensions)

**PHARMACY, BOARD OF FOR THE STATE OF FLORIDA** (See Board of Pharmacy for the State of Florida)

**PHOTOGRAPHIC EXAMINERS, BOARD OF** (See Board of Photographic Examiners)

**PLANNING BOARD, STATE** (See State Planning Board)

**PLANT BOARD, STATE** (See State Plant Board)

**PUBLIC LAND OFFICE**

The public land office is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution and §19.13, Florida Statutes, 1941).

The powers and duties of this office are set out in §§19.13-19.24, Florida Statutes, 1941 and §26, article IV, Florida Constitution.

**PUBLIC SAFETY, DEPARTMENT OF** (See Department of Public Safety)

**PUBLIC WELFARE, STATE BOARD OF** (See State Board of Public Welfare)

**RACING COMMISSION, STATE** (See State Racing Commission)

**RAILROAD ASSESSMENT BOARD**

Composed of the comptroller, state treasurer and attorney general (§195.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 195, Florida Statutes, 1941.

**RAILROAD COMMISSION, STATE** (See State Railroad Commission)

**REAL ESTATE COMMISSION, FLORIDA** (See Florida Real Estate Commission)

**RELIEF COMMISSION, AGRICULTURAL AND INDUSTRIAL** (See Agricultural and Industrial Relief Commission)

**REVENUE, COMMISSIONER OF** (See Commissioner of Revenue)

**SECURITIES COMMISSION**

Composed of the comptroller, state treasurer and attorney general (§517.03, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 517, Florida Statutes, 1941.

**SERVICE OFFICER, STATE** (See State Service Officer)

**SPANISH WAR MEMORIAL**

The Spanish war memorial is under the supervision of the commissioners of state institutions (§265.17, Florida Statutes, 1941).

The general powers and duties are set out in §§265.17-265.22, Florida Statutes, 1941.

**STATE AGRICULTURAL MARKETING BOARD**

Composed of the governor, commissioner of agriculture and the state marketing commissioner (§603.16, Florida Statutes, 1941). The state marketing commissioner is appointed by the governor upon the recommendation of the commissioner of agriculture for terms of two years (§603.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§603.16-603.18, Florida Statutes, 1941.

**STATE ARCHEOLOGIST**

Appointed by the governor (term of office not given) (§376.01, Florida Statutes, 1941).

The general powers and duties of the state archeologist are set out in chapter 376, Florida Statutes, 1941.

**STATE AUDITING DEPARTMENT**

Composed of a state auditor and ten assistant state auditors to be appointed by the governor for terms of four years unless sooner removed by the governor (§21.02, Florida Statutes, 1941).

The powers, duties and qualifications of the state auditor and assistant state auditors are set out in chapter 21, Florida Statutes, 1941.

**STATE BEVERAGE DEPARTMENT**

The principal officer of the department shall be the director, appointed by the governor for a term of four years (§561.05, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapter 561, Florida Statutes, 1941.

**STATE BOARD OF ACCOUNTANCY**

Consists of five persons, each of whom shall be a resident of this state, and shall hold a certificate as a certified public accountant, appointed by the governor for terms of four years (§473.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 473, Florida Statutes, 1941.

**STATE BOARD OF ADMINISTRATION**

Composed of the governor, state treasurer and comptroller (§16, article IX, Florida Constitution).

The general powers and duties of the board are set out in §16, Article IX, Florida Constitution and §§344.12-344.26, Florida Statutes, 1941, and 1943 Supplement.

**STATE BOARD OF BEAUTY CULTURE**

Consists of three members appointed by the governor for terms of office for three years. Two members of said board shall be women (§477.18, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 477, 1943 Supplement, Florida Statutes, 1941.

**STATE BOARD OF CONSERVATION**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and superintendent of public instruction (§373.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 373-375, Florida Statutes, 1941.

**STATE BOARD OF EDUCATION**

Composed of the governor, secretary of state, attorney general, state treasurer and superintendent of public instruction (§3, article XII, Florida Constitution).

The general powers and duties of the board are set out in §3, article XII, Florida Constitution and in §§229.07 and 229.08, Florida Statutes, 1941.

**STATE BOARD OF ELECTION CANVASSERS**

Composed of the secretary of state, comptroller and attorney general (§99.49, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§99.49-99.51 and 102.47 and 102.48, Florida Statutes, 1941.

**STATE BOARD OF EXAMINERS FOR NURSES**

Consists of five nurses, residents of this state, appointed by the governor for terms of four years (§464.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 464, Florida Statutes, 1941.

**STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

Consists of the state health officer and four other members to be appointed by the governor for terms of four years (§470.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 470, Florida Statutes, 1941.

**STATE BOARD OF HEALTH**

Composed of three members to be appointed by the governor for terms of four years (§§381.01 and 381.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 381, Florida Statutes, 1941.

**STATE BOARD OF LAW EXAMINERS**

Composed of nine members appointed by the governor, two from each congressional district as they existed on July 1, 1925, and one from the state at large for terms of three years (§39.04, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in chapter 39, Florida Statutes, 1941, and §§39.06 and 39.07, 1943 Supplement, Florida Statutes, 1941.

**STATE BOARD OF NATUROPATHIC EXAMINERS**

Composed of three practicing naturopathic physicians, residents of this state, appointed by the governor for terms of four years (§462.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 462, Florida Statutes, 1941, and 1943 Supplement, Florida Statutes, 1941.

**STATE BOARD OF OSTEOPATHIC MEDICAL EXAMINERS**

Consists of six regularly licensed osteopathic physicians, appointed by the governor for terms of three years (§459.05, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 459, Florida Statutes, 1941.

**STATE BOARD OF PENSIONS**

Composed of the governor, comptroller and state treasurer (§291.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 291, Florida Statutes, 1941.

**STATE BOARD OF PUBLIC WELFARE**

Composed of seven members to be appointed by the governor for terms of four years (§409.01, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in chapters 409, 412 and 413, Florida Statutes, 1941.



**STATE BOARD OF VOCATIONAL EDUCATION**

Composed of the governor, secretary of state, state treasurer, attorney general and superintendent of public instruction (§229.08, Florida Statutes, 1941).

The general powers and duties of the board are set out in §229.08, Florida Statutes, 1941.

**STATE BUDGET COMMISSION**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and state superintendent of public instruction (§216.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 216, Florida Statutes, 1941 and §192.51, 1943 Supplement, Florida Statutes, 1941.

**STATE FIRE MARSHAL**

The state treasurer is ex officio state fire marshal (§633.01, Florida Statutes, 1941).

The general powers and duties of the state fire marshal are set out in chapter 633, 1943 Supplement, Florida Statutes, 1941.

**STATE HOUSING BOARD**

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§424.04, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 424, Florida Statutes, 1941.

**STATE LIBRARY BOARD**

Composed of three members appointed by the governor for terms of four years (§§257.01 and 257.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 257, Florida Statutes, 1941.

**STATE LIVESTOCK SANITARY BOARD**

Composed of seven practical livestock men, residents of the state, appointed by the governor for terms of four years (§585.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 585, Florida Statutes, 1941.

**STATE MOTOR VEHICLE COMMISSIONER**

Appointed by the governor for a term of four years (§318.01, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 318, Florida Statutes, 1941.

**STATE PLANNING BOARD**

Composed of the secretary of state, the chairman of the state road department and three members, to be appointed by the governor for terms of four years each (§419.01, Florida Statutes, 1941).

The powers and duties, and the qualifications of the three members of the board to be appointed by the governor are set out in §§419.02-419.12, Florida Statutes, 1941.

**STATE PLANT BOARD**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§581.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 581, Florida Statutes, 1941.

**STATE RACING COMMISSION**

Consists of five members appointed by the governor for terms of two years (§550.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 550 and 551, Florida Statutes, 1941.



**STATE RAILROAD COMMISSION**

Consists of three commissioners, elected by the qualified electors of the state for terms of four years (§350.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §35, article V, Florida Constitution; chapters 323, 347, 350, 352, 360, 364, and §116.19, Florida Statutes, 1941.

**STATE ROAD DEPARTMENT**

Consists of five members, appointed by the governor for terms of four years (§341.01, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapters 317, 331, 341, 479, §§208.09, 350.75, 952.16-952.21, Florida Statutes, 1941.

**STATE SERVICE OFFICER**

Appointed by the governor for a term of four years (§292.02, Florida Statutes, 1941).

The general powers and duties of the state service officer are set out in chapter 292, Florida Statutes, 1941.

**STATE SOIL CONSERVATION BOARD**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§582.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 582, Florida Statutes, 1941.

**STATE TEXTBOOK PURCHASING BOARD**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§233.13, Florida Statutes, 1941).

The powers and duties of the board are set out in §§233.13 and 233.26, Florida Statutes, 1941.

**STATE TUBERCULOSIS BOARD**

Composed of three members to be appointed by the governor for terms of four years (§392.01, Florida Statutes, 1941).

The powers, duties and qualifications of the board are set out in §§392.02-392.14, Florida Statutes, 1941.

**STATUTORY REVISION DEPARTMENT**

This department is under the supervision and direction of the attorney general (§16.43, 1943 Supplement, Florida Statutes, 1941).

The powers and duties of the department are set out in §§16.44-16.51, 1943 Supplement, Florida Statutes, 1941.

**STEPHEN FOSTER MEMORIAL COMMISSION**

Composed of five members, citizens and residents of the state, appointed by the governor for terms of four years (§265.13, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.13-265.16, Florida Statutes, 1941.

**SUPERVISING INSPECTOR OF NAVAL STORES**

The supervising inspector and inspectors of naval stores are appointed by the governor, no term of office being stated (§523.08, Florida Statutes, 1941).

The general powers and duties of the inspector are set out in chapter 523, Florida Statutes, 1941.

**SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES, BOARD FOR** (See Board for Supervision and Regulation of Forms for Assumption of Risks by Surety Companies)

**TEACHERS FOR SUMMER SCHOOLS, BOARD TO NAME** (See Board to Name Teachers for Summer Schools)

**TEXTBOOK PURCHASING BOARD, STATE** (See State Textbook Purchasing Board)

**TEXTBOOK RATING COMMITTEE**

Composed of seven members appointed by the state board of education, upon the recommendation of the superintendent of public instruction, and of the superintendent of public instruction and members of his department designated by him (§233.07, Florida Statutes, 1941).

The powers, duties and qualifications of the committee are set out in §233.07-233.11, et seq., Florida Statutes, 1941.

**TRUSTEES OF TEACHERS' RETIREMENT SYSTEM, BOARD OF** (See Board of Trustees of Teachers' Retirement System)

**TRUSTEES OF THE INTERNAL IMPROVEMENT FUND**

Composed of the governor, comptroller, state treasurer, attorney general and commissioner agriculture (§253.02, Florida Statutes, 1941).

The general powers and duties of the trustees are set out in chapters 253 and 270 and §§192.38-192.50, 285.02 and 331.05, Florida Statutes, 1941, and other laws.

**TUBERCULOSIS BOARD, STATE** (See State Tuberculosis Board)

**UNIFORM STATE LAWS, COMMISSIONERS ON** (See Commissioners on Uniform State Laws)

**VETERINARY EXAMINERS, BOARD OF** (See Board of Veterinary Examiners)

**VITAL STATISTICS, BUREAU OF** (See Bureau of Vital Statistics)

**VOCATIONAL EDUCATION, STATE BOARD OF** (See State Board of Vocational Education)

## PART TWO

### Opinions



# TABLE OF CONTENTS

## Part Two

### CHAPTER I

#### STATE ORGANIZATION

	Page
Boundaries .....	91

### CHAPTER II

#### LEGISLATIVE DEPARTMENT

Senate and House of Representatives .....	93
---	----

### CHAPTER III

#### EXECUTIVE DEPARTMENT

Governor .....	95
State Comptroller .....	98
State Treasurer .....	100
State Auditing Department .....	106

### CHAPTER IV

#### JUDICIARY DEPARTMENT

Circuit Courts, Circuits, Judges .....	108
State Attorneys .....	108
Clerks of the Circuit Court .....	110
Sheriffs .....	116
Criminal Court of Record .....	122
County Courts .....	124
County Judges' Courts .....	125
Justices of the Peace .....	126
Jurors and Jury Lists .....	130

### CHAPTER V

#### CIVIL PRACTICE AND PROCEDURE

Actions at Law .....	132
Trials .....	132
Court Costs .....	133
Chancery Procedure Law .....	133
Proceedings Supplemental to Eminent Domain .....	134
Courts, Generally .....	134



## CHAPTER VI

## ELECTORS AND ELECTIONS

	Page
Election Services.....	136
Ballots.....	138
Party Assessments.....	140
Qualifications.....	141
Supervisors of Registration.....	147
Holding Elections.....	148
Voting Machines.....	152
Absent Voters.....	152
Primary Elections.....	152

## CHAPTER VII

## OFFICES, OFFICERS AND RECORDS

Holding two or more offices.....	161
Retirement, Insurance, Expenses and Appointments.....	161
Commissions.....	162
Military Leave of Absence.....	164
Powers and Duties of State Officers and Agencies.....	171
Notaries Public.....	172
General Provisions.....	173

## CHAPTER VIII

## COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

Commissioners, powers, duties and compensation.....	175
County Budgets.....	184
County Depositories.....	186
Bonds of County Officers.....	187
Fine and Forfeiture Fund.....	188
County Traffic Officers.....	189
County Hospitals.....	191
Special State Census.....	192

## CHAPTER IX

## CITIES AND TOWNS

Contraction and Extension of Territorial Limits.....	193
--	-----

## CHAPTER X

## TAXATION AND FINANCE

General Taxation Provisions.....	195
Tax Assessments and Sales.....	206
Tax Sale Certificates and Deeds.....	217
Intangible Personal Property Taxation.....	221
Excise Taxes.....	223
License Taxes.....	228
Gasoline Taxes.....	234
Financial Matters, Generally.....	236

## CHAPTER XI

## HOMESTEADS AND EXEMPTIONS

Inclusion in Municipality.....	240
--------------------------------	-----

## CHAPTER XII

## EDUCATION

	Page
State Agencies	241
County School System	242
County School Officers and Personnel	257
Courses of Study; Instructional Aids	261
Transportation of School Children	262
Finance and Taxation	263
Financial Accounts and Expenditures	265
Retirement System for Teachers	271
Board of Control	284
Institutions of Higher Learning	286

## CHAPTER XIII

## MILITARY CODE AND RELATED MATTERS

Florida State Defense Council	287
-------------------------------	-----

## CHAPTER XIV

## PUBLIC LANDS AND PROPERTY

Internal Improvement Fund	292
State Library	296
Everglades National Park	296
Monuments and Memorials	298
Public Lands	299
Grants to Riparian Owners	301

## CHAPTER XV

## PUBLIC BUSINESS

Miscellaneous	302
State Fire Insurance Fund	304
Seminole Indian Reservation	304

## CHAPTER XVI

## PENSIONS AND WAR VETERANS

Confederate Pensions	306
Veterans' Guardianship Law	306

## CHAPTER XVII

## DRAINAGE

General	309
---------	-----

## CHAPTER XVIII

## MOTOR VEHICLES

Traffic on Highways	310
Motor Vehicle Commissioner	311
Title Certificates	312
Licenses	312
Highway Patrol	316
Drivers' Licenses	317

## CHAPTER XIX

## HIGHWAYS, BRIDGES AND FERRIES

	Page
State Roads	321
Board of Administration	322

## CHAPTER XX

## CONSERVATION, ARCHEOLOGY AND GEOLOGY

Fish and Game, Generally	327
Game and Fresh Water Fish	327
Board of Conservation	332
Salt Water Fisheries	334
Shell Fish	339

## CHAPTER XXI

## PUBLIC HEALTH

State Board of Health	341
Bureau of Vital Statistics	353
Venereal Disease	353
Nuisances Injurious to Health	357
Tuberculosis Sanatorium	358
Florida State Hospital	359
Uniform Narcotic Drug Law	365

## CHAPTER XXII

## SOCIAL WELFARE

State Board of Public Welfare	369
Old Age Assistance	372
Dependent and Delinquent Children	373
Housing Authorities Law	377

## CHAPTER XXIII

## LABOR

Workmen's Compensation Law	378
Unemployment Compensation Law	381
General Labor Regulations	391
Child Labor	395

## CHAPTER XXIV

## PROFESSIONS AND VOCATIONS

Basic Science Law	399
Osteopaths	400
Chiropractors	400
Chiropody	401
Naturopathy	401
Optometry	402
Nursing	404
Dentistry	410
Funeral Directors	411
Public Accountants	412
Beauty Culture Law	414
Photography	422
Masseurs	423

## CHAPTER XXV

## REGULATIONS OF TRADE, COMMERCE AND INVESTMENTS

	Page
Milk, Cream and Milk Products	426
Hotel Commission	427
Hotels, Restaurants, Apartments; Regulations	428
Securities	430
Combinations Restricting Trade and Commerce	434
Dog and Horse Racing	434
Explosives	439

## CHAPTER XXVI

## LIQUORS AND BEVERAGES

Beverage Law; Administration	441
Beverage Law; Enforcement	444
Local Option Elections	448

## CHAPTER XXVII

## AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

State Livestock Sanitary Board	449
Board of Forestry	452
Marketing Bureau and Board	457

## CHAPTER XXVIII

## CORPORATIONS AND BUSINESS TRUSTS

Common Law Declarations of Trust	458
General Provisions	458
Foreign Corporations	462

## CHAPTER XXIX

## INSURANCE

General Provisions	463
Agents	464
Reciprocal	470
Mutual Fire Insurance Associations	471
Life Insurance, Generally	472
Sick and Funeral Benefits	472
Burial Insurance	475
Benevolent Mutual Benefit Associations	476
Limited Surety Companies	478

## CHAPTER XXX

## BANKS AND BANKING

Banking Regulations	480
Trust Companies	481

## CHAPTER XXXI

## COMMERCIAL RELATIONS

Negotiable Instruments	483
Legal Holidays	483

## CHAPTER XXXII

## REAL AND PERSONAL PROPERTY

Married Women's Property	484
--------------------------	-----

**CHAPTER XXXIII**  
**ESTATES OF DECEDENTS**

Florida Probate Law .....	487
---------------------------	-----

**CHAPTER XXXIV**  
**DOMESTIC RELATIONS**

Husband and Wife .....	488
------------------------	-----

**CHAPTER XXXV**  
**CRIMES**

Gambling .....	491
Sunday Laws .....	492
Drunkennness; Vagrancy; Desertion .....	492
Fictitious Name Statute .....	493

**CHAPTER XXXVI**  
**CRIMINAL PROCEDURE**

Arrests .....	495
Preliminary Hearing .....	497
Indictment and Information .....	498
Judgment and Sentence .....	499
Execution .....	500
Appeals .....	501
Search Warrants .....	501
Courts of County Judges and Justices of the Peace .....	502
Costs and Fees .....	503
Executive Clemency .....	503
Pardons .....	505

**CHAPTER XXXVII**  
**CORRECTIONAL SYSTEM**

Parole .....	506
Probation .....	510
Convicts .....	511
State Prison Farm .....	512
Gain Time .....	514



# CHAPTER I

## STATE ORGANIZATION

### BOUNDARIES

July 21, 1944.—044-210.

#### STATE COURT—JURISDICTION OVER CRIMES ON FEDERAL LANDS

**QUESTION:** Has the State Court jurisdiction to try an enlisted man for a crime committed on Federal Government lands within the State:

- (1) In the event a deed of cession has been executed;
- (2) In the event such deed has not been executed?

*To Honorable J. Edwin Holsberry, State Attorney, Pensacola, Florida:*

It appears that a civilian employee at Whiting Field, Navy Auxiliary Flying Field, in Santa Rosa County was run over and killed by an enlisted man of the United States Navy while he was driving a motor vehicle which is supposed to belong to the Ship's Service Store. It also appears that the State of Florida has ceded jurisdiction, both civil and criminal, over all of the United States Navy Flying Fields in your vicinity.

Search of our files and those in the offices of the Governor and Secretary of State fails to disclose a deed of cession embracing any lands in Santa Rosa County. I find in the Governor's office papers requesting a deed of cession to certain lands in Santa Rosa County described in a declaration of taking filed August 5, 1943 in the United States District Court, covering twenty-one parcels of land and aggregating 2,920 acres. Whether or not that is Whiting Field, I do not know, but no deed of cession covering that land has been executed.

Even if a deed of cession had been executed, the State of Florida in all cases reserves the right to serve civil and criminal process anywhere on the ceded land in accordance with Section 6.04, Florida Statutes, 1941. This right is reserved by the statutes regardless of the terms of the deed of cession. *Valverde vs. Valverde* 164 So. 287.

Deeds of cession conferring exclusive jurisdiction over the land give the United States exclusive jurisdiction of crimes committed on such lands. *Gill vs. State* 210, S.W. 637; *Lasher vs. State*, 17 S.W. 1062; *Underhill vs. State*, 237 Pac. 628; *People vs. Hillman*, 159 N.E. 400.

The rule is the same where the deed of cession contains a clause such as is required by the Florida Statutes, reserving to the State concurrent jurisdiction with the United States over lands so ceded for the service of all process, civil or criminal, issuing under the authority of the State or any of its courts or judicial officers; *State vs. Tully*, 78 Pac. 760; *People vs. Hillman* 159 N. E. 400; *United States vs. Unzeuta*, 74 L. Ed. 761; *Brown vs. United States*, 257 F. 46 (C.C.A. 5th Cir.).

On the other hand when there has been no cession of exclusive jurisdiction, acquisition of title to the land by the United States does not give the Federal Government exclusive jurisdiction over crimes committed on such land, but the state retains jurisdiction to prosecute. In *Curry vs. State*, 12 S.W. (2) 796, a Texas case construing statutes substantially identical with Section 6.04, Florida Statutes, 1941, where title to the prop-

erty on which the crime had been committed was in the United States, but no deed of cession had been executed, the Court said:

"... Since we are of the opinion that only one method of transferring exclusive jurisdiction to the United States Government over land purchased and used by it under the clause of the Federal Constitution already mentioned has been provided by our laws, and such method not having been followed with regard to the land under consideration, the jurisdiction of our state courts over such remains. . ."

To the same effect are: *Gill vs. State*, 210 S.W. 637 and *People vs. Hillman*, 159 N.E. 400.

From a consideration of the foregoing and other authorities on the subject, it is my opinion that when exclusive jurisdiction has been ceded by a properly executed instrument complying with the requirements of our statutes, jurisdiction over crimes committed on the land ceded is exclusively in the United States, but in the absence of such cession of exclusive jurisdiction the State retains jurisdiction.

In view of the fact that the person purported to have committed the alleged crime is a member of the United States armed forces, I am attaching hereto a copy of an opinion rendered by this office on March 2, 1943,\* relative to jurisdiction of civil and military courts to try such persons on criminal charges.

\* See Ch. XXXVI, Arrests.

## CHAPTER II

### LEGISLATIVE DEPARTMENT

#### SENATE AND HOUSE OF REPRESENTATIVES

June 6, 1944.—044-159.

#### LEGISLATORS—REVOCATION OF RESIGNATIONS

**QUESTION:** May resignations from certain members of the House of Representatives and certain members of the Senate, which have been accepted, be revoked?

*To Honorable Spessard L. Holland, Governor:*

It is my opinion that when a member of the House or Senate resigns and his resignation has been accepted that a vacancy in the office has been created, and this is recognized by Section 98.43, Florida Statutes, 1941. State ex rel Landis v. Heaton, 180 So. 766. December 8, 1944.—044-341.

#### STATE SENATOR—HOLDING ANOTHER OFFICE

**QUESTION:** 1. May a person hold the offices of State Senator and Notary Public at the same time?

2. May a person hold the office of State Senator and at the same time be legal adviser to a Board of County Commissioners without offending Section 7, Article III, and Section 15, Article XVI, Florida Constitution?

*To Honorable Lloyd F. Boyle, State Senator, Sanford, Florida:*

Section 7, Article III, Florida Constitution, provides that no person holding a lucrative office or appointment under the government of the United States or of this state shall be eligible to a seat in the Legislature.

Section 15, Article XVI, Florida Constitution, provides, in part, that no person shall hold or perform the functions of more than one office under the government of this state at the same time, provided, that notaries public, and certain others named, may be elected or appointed to fill any legislative, executive or judicial office.

I agree with your conclusion that the term of office of a State Senator begins on the day of election. Section 2, Article VII, Florida Constitution; In re Advisory Opinion to Governor, 76 Fla. 417, 79 So. 874; Taylor v. Crawford, 95 Fla. 438, 116 So. 41.

In my opinion, Section 7, Article III and Section 15, Article XVI are to be read together; and the provisions of the latter constitutional provision would seem to dispose of the first question.

You refer in your letter to the "office of County Attorney or Attorney for the Board of County Commissioners." I am assuming from the wording of your letter that you are not employed by such Board under Section 125.03, Florida Statutes, 1941, and that you refer to no elective office, but that you are merely retained by such Board as its legal adviser under certain terms of employment. This opinion with respect to the second question is based on that understanding.

The post or position of Attorney for a Board of County Commissioners, under the circumstances named, in my opinion, is no office within the meaning of the above constitutional provisions. Our Supreme Court has stated that "there is a manifest difference between an office and an employment under the government." *State v. Hocker*, 22 So. 721, 722. It is my further opinion that the term "appointment" as used in above Section 7, Article III, does not contemplate or include employment of an attorney by a Board of County Commissioners under the circumstances above stated.

You will note that the request of the Governor for an opinion in the matter of *In re Advisory Opinion to the Governor*, 79 So. 874, dealt with the "office" of a County Solicitor and referred to a "commission" with respect to such office.

On the basis of the foregoing, in my opinion, both questions should be answered in the affirmative.

## CHAPTER III

### EXECUTIVE DEPARTMENT

#### GOVERNOR

January 13, 1943.—043-19.

#### AUTHORITY TO ISSUE COMMISSIONS

**QUESTION:** Has the Governor the authority to issue a commission to a member of the Dade County School Board who has been re-elected after the Governor has removed said member from office?

*To Honorable Spessard L. Holland, Governor:*

Section 7 of Article VIII of the Constitution provides that "All county officers, except Assistant Assessors of Taxes, shall, before entering upon the duties of their respective offices, be commissioned by the Governor." The issuance, therefore, of a commission is an absolute prerequisite to the right to perform the functions of a county office such as member of the County Board of Public Instruction.

Section 14 of Article XVI of the Constitution provides that "All State, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified."

Section 230.04, Florida Statutes, 1941, being a part of the School Code of this State, provides the following qualifications for members of county school boards: "The members of the county board shall be qualified electors of the county in which they serve, shall be persons of good moral character, of good standing in their respective communities, and shall be known for their integrity, business ability, public spirit and interest in the promotion of public education."

The Supreme Court of this State, in the case of *State, ex rel. Axelroad v. Cone*, 188 So. 93, a mandamus proceeding seeking to coerce the Governor to countersign a warrant drawn upon the Comptroller to pay the salary of the relator, held "The judiciary is without power to direct or coerce the Governor in the exercise of any administrative function." The foregoing is an enunciation of the law, in spite of the fact, as the Court recited, that the validity of relator's claim had been previously upheld and the Comptroller ordered to draw his warrant for the amount due.

Precedent for the cited case is *State, ex rel. Bisbee v. Drew*, 17 Fla. 67, the first two headnotes of which are as follows:

"1. Courts have no power to control the action of the Governor in the discharge of any duty pertaining to his office under the laws of the State." (Emphasis supplied).

"2. The issuing of a commission or a certificate of election, required by law to be issued by the Governor, though ministerial in its nature, is yet an executive act pertaining to his office as the chief magistrate of the State."

The Court, in the *Bisbee* case, after reviewing the decisions of various jurisdictions, both pro and con, quoted from an Illinois case in which it was said that the Court had no control over the Governor to compel him to perform any public duty, but "remitted him to the high tribunal of his own conscience."



Ordinarily, the issuance of a commission to an elected official is purely a ministerial act without involving any measure of discretion, but, due to the fact that the person in question was removed from office by you as Governor of the State upon charges made, presented and heard, after such hearing, and due to the fact that the cited section of our State School Code makes it a prerequisite for members of county boards that they shall be "persons of good moral character, of good standing in their respective communities, and shall be known for their integrity, business ability, public spirit and interest in the promotion of public education." These prerequisites have to do with a member of any such board, and relate to a status that cannot become legal until the commission has been issued by the Governor for such membership. If in the performance of your executive responsibility you have found it necessary to remove a former member of the same board because of the lack of any one of these qualifications, it is my opinion that such a situation does place the Governor in a position where he has the power, authority and right to so interpret his duty in the issuance of a commission to the same person re-elected to the same office, as would invoke the exercise of his discretion in passing upon whether or not to issue a commission to such office to such person. And in the exercise of such discretion he is acting within the provision quoted from Section 230.04, *supra*, in withholding and refusing to issue such commission, if, in his opinion, the facts proven, upon which the removal of the officer was predicated, show that he, at the time of such removal, lacked any one of these qualifications.

In the exercise of this discretion the proximity of the time when the removal occurred, to the time when the new commission might be issuable, and the fact that the removal had not taken place, and therefore the public did not have the fact of this removal before them, when the re-election by the public of the person involved, to the same office, occurred, are proper matters to be given consideration by you in the exercise of your discretion determining whether or not to issue a new commission to such re-elected officer. And in so doing, of course, your declining to issue the commission, predicated upon your official belief of the particular person's lacking in the qualifications prescribed in the statutes or any one of them, would be within your executive powers.

Under the provisions of Section 14, Article XVI of the Constitution of Florida, quoted above, it is my opinion that the incumbent of the office of Member of the County School Board of Dade County, to which office the person in question was re-elected, would continue to hold such office even after the expiration of his official term until his successor was duly qualified, and the issuance of a commission to him under Section 7 of Article VIII of our State Constitution is a necessary prerequisite to the latter's right to claim himself as duly qualified for entrance upon the duties of office.

June 6, 1944.—044-158.

#### MESSAGES—SPECIAL SESSION OF THE LEGISLATURE

**QUESTION:** Is it necessary for the Governor to send veto messages, etc., to a special session of the Legislature?

*To Honorable Spessard L. Holland, Governor:*

It is my opinion that it is not necessary to send to a special session of the Legislature such matters as veto messages, reprieves, forfeitures remitted, pardons or commutations granted.

The basis of this opinion is the advisory opinion to the Governor reported in 59 So. 786, 787, in which, as you will observe, the Supreme Court

considered the language of Section 2 of Article III and Section 8 of Article IV with the language of section 11 of Article IV, and stated:

"A consideration of these two sections, together with the language used in requiring the report to be made, discloses an intent that such report shall be made to the Legislature at the beginning of every regular session, and that the Governor need not communicate to the Legislature, at an extra or special session convened by executive proclamation, the specified data as to fines, pardons, reprieves, commutations, etc., unless reference to it is included in the proclamation convening the Legislature in extra session, or unless it is by the Governor called to the attention of the Legislature while in session as 'legislative business', or unless such report is called for or taken up by a two-thirds vote of each house of the Legislature."

While veto messages are not specifically mentioned in the opinion of the Supreme Court yet it is my opinion that the "etc." in the Supreme Court opinion following commutations was designed to cover all such special matters which would logically include veto messages.

I do not find in the Constitution any specific requirement that veto messages be sent to a special session.

April 26, 1943.—043-103.

#### REMOVAL OF OFFICERS DURING SESSION OF THE SENATE

QUESTION: What is the procedure to be employed should it become necessary to remove a public officer during the session of the Legislature?

*To Honorable Spessard L. Holland, Governor:*

I wish to advise that this question was answered by the Supreme Court in an advisory opinion to the Governor in 68 So. 450, where the Court said:

"In consideration of the whole context of the quoted section of our organic law, we are of the opinion that the power of the Governor to simply suspend an officer exists only between the sessions of the Senate, and that while the Senate is in session he cannot, during such session, suspend an officer, but **can then only recommend to the Senate then in session a permanent removal of such officer.**" (Emphasis supplied).

In the case of *State ex rel. Hatton v. Joughin*, 145 So. 174, this advisory opinion was cited with approval. This case reaffirmed the holding of the Court in the case of *State ex rel. Hatton v. Joughin*, 138 So. 392, where the Court said again: "The Governor, during session of the Senate, cannot suspend a public officer but can only recommend permanent removal."

From my review of the last cited case, it seems that the procedure to follow is to recommend to the Senate that the named officer be removed and set forth the grounds of your recommendation exactly in the same manner that same would be contained in an executive order of suspension and that same should be transmitted to the Senate in the same manner as all executive communications.

November 21, 1944.—044-323.

#### VACANCY IN ELECTIVE OFFICE—APPOINTMENT

QUESTION: Upon the death of a Sheriff subsequent to the last (1944) general election, such Sheriff having been elected at such election to succeed himself for the new term beginning the Tuesday after the first Monday in January, 1945, may the Governor appoint a successor to said

deceased Sheriff for the new term extending until Tuesday after the first Monday in January, 1947?

*To Mr. J. R. McClure, Executive Secretary, Office of the Governor:*

It appears that the power of the Governor to fill a vacancy in office under the circumstances presented by the above factual situation derives from Section 7, Article IV, Florida Constitution, which is as follows:

**"SECTION 7. Vacancies in office; appointments.**—When any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term."

It would seem, therefore, that at this time the Governor may appoint a successor to the deceased Sheriff only for the remainder of the latter's present unexpired term. See *State ex rel Landis, Attorney General, v. Taylor* (1933), 146 So. 549.

For the reasons above stated, in my opinion the question should be answered in the negative.

June 18, 1943.—043-141.

#### VETO OF APPROPRIATIONS

**QUESTION:** The Governor's veto message of June 12, 1943, as it relates to item 62 of Chapter 22071, Laws of Florida, Acts of 1943—the General Appropriation Act—reduced appropriation items 5 per cent annually. Are institutions under the management of the Board of Control to receive 100 per cent of the appropriations made by said act?

*To Honorable J. T. Diamond, Secretary, Board of Control:*

Section 18, Article IV, Florida Constitution, provides:

**"Veto of appropriations.**—The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto."

Under this provision, item 62 and others which were vetoed, are void until such time as they may be repassed at the next legislative session.

Educational institutions will receive 100 per cent of the appropriations set forth in said Act approved by the Governor.

#### STATE COMPTROLLER

January 12, 1944.—044-11.

#### DUPLICATION OF LOST OR DESTROYED WARRANTS

**QUESTION:** 1. Would the Comptroller be negligent in his duty if he failed to require bond upon the occasion of duplicating a warrant?

2. What are the responsibilities of the State Treasurer and the Comptroller for having improperly issued a duplicate warrant without complying with Section 17.13, Florida Statutes, 1941?

*To Honorable J. M. Lee, State Comptroller:*

In reply to the above inquiry I beg leave to state that it is my opinion that Chapter 22006, Acts of 1943, was not intended to and did not repeal

the provisions contained in Section 17.13, Florida Statutes, 1941, and that they should be read together.

It is further my opinion that the Treasurer and Comptroller would be responsible for any loss or damage occasioned by their failure to require compliance with the terms and provisions of Section 17.13.

August 2, 1944.—044-252.

#### WARRANTS FOR PURCHASE OF LAND; ISSUANCE

**QUESTION:** Has the Comptroller authority to issue a warrant in payment of the purchase price of land in Charlotte County which is being purchased by the Game and Fresh Water Fish Commission?

*To Honorable J. M. Lee, State Comptroller:*

On August 26, I forwarded a copy of my opinion dated August 5 covering the title to the lands referred to in the bill submitted by the aforesaid Commission, and reiterated my opinion with respect to the title to such lands. It is my understanding that the principal concern of your office is the possibility that said lands have been encumbered in some manner since the certification dates of the abstracts around the middle of last May. While it is true that some time has passed since such certifications, it is equally true that we will never be able to obtain abstracts certified to as of the date the warrant is to be issued, since such abstracts must be prepared and certified elsewhere and then forwarded here for examination. In other words, there will always be a certain amount of elapsed time between the dates of the certifications and the date of the warrant during which a lien could attach. In fact, even when an attorney examines a title from the records in the courthouse, some encumbrance may be placed on record between the time he leaves the courthouse and the time he begins to dictate his opinion.

In view of the foregoing, it will always be necessary for this office to limit its opinion to the certification dates of the abstracts and we cannot venture an opinion founded upon conjecture as to what may or may not have occurred thereafter which might affect the title. Therefore, I must repeat that my position with respect to the title of the aforesaid lands is as stated in the opinion dated August 5.

It might be pointed out that the deed to be received by the Game and Fresh Fish Commission is one of a series of parcels of land in the same tract executed by the same company. In this deed, as in the preceding deeds, the title is warranted and the request for the warrant to pay for the lands described therein has been made in like manner as warrants requested and issued in payment for the lands already conveyed to the commission.

The Florida Company which owns the lands can be asked to have the abstracts re-certified and brought down to date and such company can call again upon the Clerk of the United States District Court, Southern District of Florida, to make a search for Federal liens, but this may jeopardize the settlement of the suit for specific performance against the Florida Company under which settlement the commission agreed to take the lands referred to in its request for a warrant.

In the final analysis the matter resolves itself into one of whether the abstracts are to be re-certified and re-examined when it is known in advance that they will not cover the full period down to the date upon which the warrant is issued, or whether the warrant is to be issued on the basis of the opinions already rendered and what has been said herein. The decision, it seems to me, is a purely practical matter and I leave the same to your own good judgment.



**STATE TREASURER**

June 18, 1943.—043-142.

**ATTORNEY GENERAL—MONEYS IN COURT REGISTRY FUND**

**QUESTION:** Section 54.06, Florida Statutes, 1941, as amended by Chapter 21993, Acts of 1943, requires the State Treasurer to notify the Attorney General of all moneys in the Court Registry Fund which have been adjudicated or are not in dispute and which have been on deposit and unclaimed for a period of five years. The State Treasurer states that he has no way of knowing whether such funds have been adjudicated or not, or whether or not their ownership is disputed.

Several accounts in the Court Registry Fund are active, showing deposits and withdrawals over a long period of time, and the State Treasurer's records do not show which specific deposits have been withdrawn.

In connection with the foregoing, what procedure should the State Treasurer follow in complying with the statute under the above circumstances?

*To Honorable J. Edwin Larson, State Treasurer:*

It is my suggestion that you furnish my office with a list of all deposits more than five years old in those accounts where there is a balance on hand at the present time.

Of course, there should accompany such information such other information as you may have which will assist in locating the particular case in the particular court where the deposit was originally made. I will then be able to follow this up with the Clerk of that Court and complete the information necessary to have such funds transferred as provided for in said statute.

January 7, 1944.—044-17.

**DEPOSIT OF STATE MONEYS**

**QUESTION:** 1. Should State moneys deposited by the State Treasurer in various banks of the State be considered as having been deposited under Section 653.10 or Section 18.11, Florida Statutes, 1941?

2. Does Section 18.11 limit eligible collateral to those types of securities specifically named in said Section 18.11?

*To Honorable J. Edwin Larson, State Treasurer:*

Section 653.10, Florida Statutes, 1941, provides that all banking companies organized under Chapter 653, Florida Statutes, 1941, which shall be designated by the Comptroller for such purpose, shall be depositories of public money under such regulations as may be prescribed by the Comptroller. This section further provides that all Sheriffs, Tax Collectors, City Treasurers, Clerks of Courts, Receivers or Treasurers, or other Agents of the State, or courts thereof, may deposit any moneys they may have in their possession or custody with such banking company but shall not be required to do so. Also, this section provides that executors, administrators, trustees, guardians, or Life Insurance Companies, having or controlling life insurance funds, may deposit the funds held by them with such banking company upon receiving sufficient security.

The foregoing statute is permissive, applies to public funds generally, and deposits may be made under it whenever there is no specific statute dealing with the particular fund in question.

Sections 18.10, 18.11, and 18.16, Florida Statutes, 1941, specifically apply to state moneys, and as the Supreme Court of Florida said in the case of *First American Bank v. Palm Beach*, 96 Florida 247, 117 So. 900,



said sections establish the policy of requiring certain state officials, including the State Treasurer, to deposit state moneys in such banks of the State as will offer the best inducement as to interest and security.

It is my opinion that Sections 18.10 and 18.11 must be construed as exceptions to Section 653.10, and all state moneys must be deposited under said Sections 18.10 and 18.11 rather than under Section 653.10.

With reference to your second question, it is my opinion that collateral eligible as security for deposits under Sections 18.10 and 18.11, *supra*, is limited to the types set out in said Sections 18.11 and 18.10, which latter section permits use of Federal Deposit Insurance as security for such deposits.

July 21, 1943.—043-171.

#### DISPOSITION OF ESCHEATED ESTATES

**QUESTION:** Is the State Treasurer authorized to comply with Chapter 21723, Acts of 1943, and is said chapter constitutional?

*To Honorable J. Edwin Larson, State Treasurer:*

Chapter 21723 is an act which attempts to require the State Treasurer to pay all money coming into his hands from escheated estates in Nassau County to the Board of County Commissioners of said county, to be credited to the County Welfare Fund.

Section 4, Article XII, of the Constitution, provides that the State School Fund shall be derived from, among other sources, the proceeds of escheated property or forfeitures.

It is my opinion that Chapter 21723, *supra*, is in direct violation of the foregoing constitutional provisions, attempting to divert escheated funds from the State School Fund and devote the same to county welfare purposes.

Said chapter being, in my opinion, unconstitutional, it is my further opinion that you are not authorized to comply with the same.

May 30, 1944.—044-157.

#### FEDERAL AID ROAD FUNDS—DEPOSIT

**QUESTION:** Where payments are made to the State Treasurer, by the Federal Government, under an agreement that such funds be placed in a separate account and be deposited in a separate trust account in a depository authorized to receive public funds, is it necessary that the State Treasurer deposit and keep such funds in a separate bank account so designated?

*To Honorable J. Edwin Larson, State Treasurer:*

It appears from the request for an opinion and the papers accompanying it, that an agreement has been entered into between the State of Florida and the Federal Government creating special trust funds of payments to the State of Florida as reimbursement for having made the Davis Toll Bridge and Causeway free of tolls, said agreement having been executed by the State Road Department of Florida, the State Treasurer and the Federal Works Administrator. Section 1 of the said contract reads as follows:

"1. That all payments to the State of Florida under the provisions of said acts of congress for having acquired and made free said toll bridge and causeway shall be made to the Treasurer, placed in a separate fund account, and deposited in a special trust account in a depository authorized to receive the public funds of the State."

This agreement provides for the payment, out of Federal Aid Road Funds apportioned to Florida, of fifty per cent of the amount expended by said Department for acquisition by the State of Florida of Davis Toll Bridge and Causeway across Tampa Bay between Tampa and Clearwater, and further provides, with particularity, how such moneys to be paid out of said Federal Aid Road Funds shall be held, expended and accounted for by the State.

Section 24, Article IV, Constitution of Florida, provides that all moneys of the State of Florida shall be received and kept by the State Treasurer in the manner prescribed by law. Under State laws, (Chapter 18, Florida Statutes, 1941) the office of the State Treasurer, or to put it another way, the State Treasury, is the depository of such moneys. It is further noted that all such State Funds are disbursed by warrant of the Comptroller on the State Treasury, which precludes the idea that any warrant evidencing the payment of an obligation of any Department of the State may be drawn by the Comptroller with respect to any particular bank where State Funds may be deposited.

Section 18.10, Florida Statutes, 1941, provides that the State Treasurer may deposit moneys of the State in such banks of the State as may be designated and may meet the requirements of said section.

In view of the fact that our laws contemplate that State Funds may be deposited in banks, as aforesaid, in my opinion the wording of the part of this agreement which you have quoted indicates that it was the intention of the signatories thereto that these funds mentioned should be deposited in a special trust account in a bank authorized to receive the public funds of the State, as provided by the above quoted law of the State of Florida.

July 13, 1944.—044-204.

#### MEMBERSHIPS IN THE STATE CHAMBER OF COMMERCE

QUESTION: May the Treasury Department acquire memberships in the Florida State Chamber of Commerce, and pay the dues from the Department's Necessary and Regular Expense Fund?

*To Honorable J. Edwin Larson, State Treasurer:*

The Florida State Chamber of Commerce is a corporation. Its charter provides for a number of projects which have for their purpose the promotion of the economic and social development of the State. Said charter also provides that certain services be rendered to its members. Among these service are statistical analyses, periodical bulletins, and business reviews. It is also provided that the State Chamber shall maintain a service bureau for collecting and furnishing to its members, without cost, information of a useful character.

It is my opinion that, if your Department needs the services rendered by the Florida State Chamber of Commerce which can only properly be secured by the acquisition of memberships, you have the authority to pay the same out of your Necessary and Regular Appropriation.

If there are divisions of your Department which need the services rendered by the Florida State Chamber of Commerce, it is my opinion that you have the authority to acquire a membership for each of such divisions. Your authority to subscribe to memberships is of course, on the presumption that they are for essential services actually to be rendered to your Department and that the subscriptions are not in the nature of donations or contributions which, of course, you have no authority to make, except as may be specifically provided by law.

November 5, 1943.—043-307.

**PUBLIC FUNDS—SECURITIES ACCEPTABLE**

**QUESTION:** Are tax anticipation certificates issued by the State Board of Administration acceptable as security for State Funds, Municipal Funds, and Funds of the Boards of County Commissioners and Boards of Public Instruction deposited in banks?

*To Honorable J. Edwin Larson, State Treasurer:*

Section 16, Article IX of the Constitution of Florida, authorizes the State Board of Administration to issue gasoline and other fuel tax anticipation certificates, which are protected and guaranteed by the excise tax on gasoline and other fuels.

Chapter 21889, Laws of Florida, Acts of 1943, makes such tax anticipation certificates legal investments for banks and trust companies.

With reference to the deposit of State Funds, Section 18.10, Florida Statutes, 1941, provides that the Governor, Comptroller and State Treasurer may deposit the moneys of the State in such banks of the State as will offer satisfactory inducement as to security.

Section 18.11 provides that the security to be given by such banks as may be designated under Section 18.10, supra, for the deposit of State Funds, shall consist of bonds of the United States and of the several states; county and municipal bonds, and county or county school time warrants issued by any one of the counties or cities of the State of Florida.

Tax anticipation certificates issued by the State Board of Administration are not included within any of the foregoing classes of securities. Unlike county bonds and county time warrants, these certificates are not protected and guaranteed by any general ad valorem taxing power, but their payment is solely from the excise tax aforesaid. The fact that these certificates have been made legal investments for banks is not sufficient to make them acceptable security for deposit of State Funds under the foregoing statutes, since not all legal investments are acceptable for such security. For example, mortgage bonds of railroad companies and public service companies and real estate first mortgage bonds are also legal investments for banks but are not acceptable as security for the deposit of State Funds.

Therefore, it is my opinion that State Funds deposited under Section 18.10, supra, may not be secured by such tax anticipation certificates.

With reference to County Funds, Section 136.01, Florida Statutes, 1941, provides that deposits of such funds shall be secured by United States bonds, bonds the payment of whose principal and interest is guaranteed by the United States, Federal certificates of indebtedness, and state, county or municipal bonds. Under date of November 1, 1943, I rendered an opinion to the Comptroller, in which I held that County Funds deposited under said Section 136.01 could not be secured by tax anticipation certificates issued by the State Board of Administration, and I enclose a copy of that opinion for your information.

Likewise, with reference to County School Funds, Section 237.32, Florida Statutes, 1941, provides that deposits of such funds shall be secured by federal, state, county or municipal bonds, or bonds the payment of principal and interest of which is guaranteed by the United States or by federal certificates of indebtedness.

For the reasons hereinbefore set forth, it is my opinion that tax anticipation certificates issued by the State Board of Administration are not acceptable security for County School Funds deposited under Section 237.32, supra.

Concerning Municipal Funds, reference should be made to the specific provisions of the charter of the particular municipality involved.

Obviously, I have been unable to make a study of the charter provisions of the various cities and towns of the State.

I call your attention, however, to the provisions of Section 653.10, Florida Statutes, 1941, as they may apply to Municipal Funds and other Public Funds. This statute authorizes certain banking companies which may be designated by the Comptroller for such purpose, to act as depositories for Public Funds. Funds deposited under this statute must be secured by bonds of the United States or of the State of Florida or other satisfactory security.

Therefore, it is my opinion that deposits of Public Funds lawfully made under the provisions of Section 653.10, *supra*, in banks designated for that purpose by the State Comptroller, may be secured by tax anticipation certificates issued by the State Board of Administration if the State Comptroller determines that such certificates are "satisfactory security" for such deposits.

March 24, 1944.—044-96.

#### RECEIPT TO PREDECESSOR

QUESTION: 1. Is the receipt to be furnished the State Treasurer's predecessor in office, as provided by Section 18.01, Florida Statutes, 1941, mandatory?

2. If such receipt is executed and delivered, will additional liability thereon be incurred?

3. In the event the receipt should be given, is the form of the attached receipt proper?

*To Honorable J. Edwin Larson, State Treasurer:*

The above Section 18.01 provides for the furnishing of a bond by the incoming State Treasurer, and then provides the method whereby the bond given by the retiring State Treasurer is discharged upon the State Comptroller filing with the Secretary of State a certificate containing certain recitations required by this section, with respect to due accounting by the retiring Treasurer. Among other things, this section requires that such certificate shall recite that the retiring Treasurer has "filed receipts from his successor for all vouchers paid since the end of last quarter, and for balance of cash, and for all bonds and other securities held by him as such treasurer." Since the furnishing of the receipt is necessary in order that proper certificate, as provided by said Section 18.01, may be filed with the Secretary of State by the Comptroller to effect discharge of the official bond of your predecessor in office, the law is mandatory with respect to the giving of the receipt.

The form of receipt has been amended to read as set forth below. The giving of such a receipt should charge you with no additional liability. The suggested form of receipt is as follows:

"I, J. EDWIN LARSON, as Treasurer of the State of Florida, did receive of and from William V. Knott, formerly State Treasurer and my predecessor in office, at the time of his retirement from office at the close of business on December 31, 1940, all vouchers paid since the end of last quarter (i. e. all warrants paid during the quarter immediately preceding his retirement, as aforesaid, except those warrants which prior to the end of such quarter had been delivered by him to the State Comptroller, and had been properly receipted for by the latter), and balance of cash, and all bonds and other securities held by my said predecessor as such Treasurer, as shown by the official records of said office at the close of business on December 31, 1940, all as set forth and reflected in the report of the state auditor rendered under date of June 12, 1941, said auditor's



report being officially numbered 2366; and a copy of such audit being hereto attached and by reference made a part hereof."

The official audit referred to above appears to cover and find due accounting by your predecessor in office of the various items covered by the above receipt. This audit is the proper means whereby you have determined that due accounting has been made by your predecessor in office, with respect to the matters covered by your receipt. On the other hand, since the audit is official, limiting the receipt to the extent that the matters set forth in the receipt are disclosed by the audit should not embarrass the Comptroller in the execution of the certificate required by the above section, insofar as such receipt is required from you.

January 7, 1944.—044-9.

#### SECURITY FOR DEPOSIT OF FUNDS

**QUESTION:** 1. Are revolving funds of the Overseas Road and Toll Bridge District which are not under the State Treasurer's control protected under the Federal Deposit Insurance Corporation's bank deposit guaranty, in addition to such coverage on accounts of the District under the control of the State Treasurer?

2. May the bank in which such revolving funds are deposited legally pledge its collateral to the State Treasurer as protection for those deposits?

3. Can toll revenue deposited by the Overseas Road and Toll Bridge District in a special account for periodic transfer to the State Treasurer as Treasurer of the Overseas Road and Toll Bridge District be legally protected by collateral pledge to the State Treasurer either as State Treasurer or as Treasurer ex officio of the Overseas Road and Toll Bridge District?

*To Honorable J. Edwin Larson, State Treasurer:*

Revolving Funds of the Overseas Road and Toll Bridge District which are not under the control of the State Treasurer, and other funds of said District which are under the control of the State Treasurer as Treasurer of said District, all belong to the District, which, under the Federal Deposit Insurance Law, is in the final analysis the owner of all deposits of such funds, and would be considered the depositor in each instance for the purpose of determining the Federal Deposit Insurance coverage which is limited to \$5,000 coverage for each depositor. Therefore, it is my opinion that District Funds in the amount of only \$5,000 are covered by Federal Deposit Insurance, whether said funds are deposited in one or more accounts in the name of the District or in the name of the State Treasurer or both.

With reference to your second question, collateral pledged to the State Treasurer would not protect the revolving funds referred to in your request, since such Revolving Funds are not under the control of the State Treasurer. However, since all funds of the District deposited by the State Treasurer are, as you say, protected by collateral pledged for that specific purpose, the \$5,000 Federal Deposit Insurance coverage to which the District is entitled could be allotted as security for the deposit of the Revolving Funds you referred to, by the bank holding such deposit, and it in turn required to secure any other fund held by it from the same depositor, with other securities.

Your third question would appear to present nothing more than an administrative problem which is easily solved by depositing toll revenue directly in the account maintained by the State Treasurer as ex officio treasurer of said District. Section 2 (h) of Chapter 16598, Laws of Florida, Special Acts of 1933, under which law said District was created, contemplates that all moneys of the District shall be deposited by the State Treasurer, and there appears to be no authority for nor any particular reason why a transfer account should be set up for handling toll



revenue. If such revenue is immediately upon its receipt turned over to the State Treasurer and deposited by him, it will be covered by collateral pledged to him as security for the deposit of District Funds and there will be no necessity for pledging additional collateral to secure a temporary transfer account. However, if this toll revenue is first deposited in the name of the Overseas Road and Toll Bridge District, it is not then protected by collateral pledged to the State Treasurer either as State Treasurer or as Treasurer ex officio of the Overseas Road and Toll Bridge District.

### STATE AUDITING DEPARTMENT

August 25, 1943.—043-242.

#### AUDITING DRAINAGE DISTRICT BOOKS

**QUESTION:** Who has the power to audit the books of a Drainage District and to remove or suspend a Drainage District Supervisor?

*To Honorable Spessard L. Holland, Governor:*

I have examined all of the law relating to these two matters and find that under the provisions of Section 298.11, Florida Statutes, 1941, the Board of Drainage Commissioners of the State can, if certain circumstances exist, appoint supervisors (1) when the State owns land and (2) where no election has been held, then "notice of such failure shall be given in writing by any person interested to the board of drainage commissioners of this state, which shall as soon as practicable appoint three competent persons who own land in such district as such supervisors for the term of one, two and three years, respectively, and who shall hold their office until their successors are elected or appointed and qualified. Any such supervisor so appointed by the said board of drainage commissioners may be removed by the said board for dishonesty, incompetence or failure to perform the duties imposed upon him by this chapter and any vacancy which may occur in any such office so filled by appointment shall be filled by said board as soon as practicable."

Section 298.65, Florida Statutes, 1941, provides that, "the governor may, when requested by a resolution adopted by the local governing authority of any drainage district or sub-drainage district, direct an audit to be made by the state auditing department of the accounts, books and records of any drainage or sub-drainage district. . ."

Section 21.10, which is in the chapter providing for the State Auditing Department, provides: "The Governor may, when in his judgment it shall be necessary, designate and direct any one or more of the auditors provided for in this chapter, to audit the office, books and records of any county, of any state or county officer, or of any state institution, board or commission. The Governor may, if in his judgment it shall be necessary, employ not exceeding two expert and efficient accountants, in addition to the auditors provided for in this chapter, to make a special audit of any state department, state or county office, state institution, board or commission. . ."

In passing I might call to your attention Section 298.51, which provides for the appointment of a receiver of a district upon the application of any holder of a bond or interest coupon that is overdue for a period of more than sixty days. Usually if the affairs of the districts are not being properly managed they are in default of their bonds.

Apparently under Article IV, Section 15, of the Constitution, the Governor could suspend "all officers that shall have been appointed or elected that are not liable to impeachment."

Our Supreme Court in the case of *State vs. Blake*, 148 So. 566, held that "a duly elected trustee of a special tax school district is an officer. If such trustee is a 'subordinate school officer,' he is subject to removal from

office by the state board of education under Section 3, Article XII, of the Constitution, and such power of removal cannot be conferred upon the county board of public instruction by statute. If such trustee is not a 'subordinate school officer,' he is an officer subject to suspension from office by the Governor, and to removal from office by the action of the Governor and the state Senate under Section 15, Article IV, and such authority to suspend or remove from office cannot be delegated to the county board of public instruction by statute."

Apparently under this decision the Governor would be the only proper person to suspend a Supervisor of a Drainage District. It is entirely possible that if the State Auditor is not required under the provisions of Section 21.10 to make such audit, the provision that I have quoted with regard to the State Auditing Department is broad enough for the Governor to have an audit made.

## CHAPTER IV

### JUDICIARY DEPARTMENT

#### CIRCUIT COURTS, CIRCUITS, JUDGES

March 16, 1943.—043-76.

##### JUDGES; DISQUALIFICATION—APPOINTMENT OF SUBSTITUTE

**QUESTION:** One of the Judges of the Fourteenth Judicial Circuit has recused himself in a certain cause, and has sent a copy of the order to the Governor to that effect. Is it necessary to designate, assign and appoint another Circuit Judge of the same circuit to try and determine the above cause?

*To Honorable Spessard L. Holland, Governor:*

Offhand, this would appear to be a relatively simple question in view of the fact that there is another judge in the same circuit who is qualified and available to hear the case but our statutes are not very clear on this subject.

Under Section 38.09 it is specifically provided, upon a judge disqualifying himself and mailing a copy of the order to the Governor, that the Governor shall thereupon designate another judge to hear said cause.

Section 38.11 provides that when any judge is unable, in vacation or between terms, for any reason, to perform the duties of his office, that any other judge of the court of the same jurisdiction, upon application of any party, shall perform such duties and hear and determine all such matters as may be submitted to him.

You will note that both of these sections have been carried forward into the Florida Statutes of 1941 and, therefore, both have been re-enacted as the law of Florida.

In view of the above it would be my suggestion that you do designate the other judge to hear this case and suggest to the attorney who brought this matter to your attention that he make application to said judge for a further hearing in the matter. It seems to me that this will take care of the situation under either statute.

#### STATE ATTORNEYS

December 30, 1943.—043-338.

##### APPEALS IN CRIMINAL CASES—DUTIES

**QUESTION:** Is it the duty of the State Attorney to represent the State in (1) appeals in criminal cases from Justice of the Peace Courts, Courts of Crimes, and Criminal Courts of Record to the Circuit Court, and (2) appeals in criminal cases from a Municipal Court to the Circuit Court?

*To Honorable Stanley Milledge, State Attorney, Miami, Florida:*

Section 15 of Article V of the Constitution of the State of Florida provides that the duties of the State Attorney shall be prescribed by law. Section 27.02, Florida Statutes, 1941, prescribes the duties of the State Attorney insofar as criminal cases are concerned, and reads as follows:

"The State Attorney shall appear in the Circuit Court within his judicial circuit, and prosecute or defend on behalf of the State

all suits, applications or motions, civil or criminal, in which the State is a party."

I am unable to find where the Supreme Court of Florida has ever construed Section 27.02 and passed upon the questions involved here.

In view of the unambiguous language of Section 27.02 it clearly appears that it is the duty of the State Attorney to represent the State in all appeals in criminal cases pending in the Circuit Court, as the State is unquestionably a party in all such cases.

Section 27.02 makes no reference to appeals from Municipal Courts, and I am unable to find any other provision of law making it the duty of the State Attorney to handle such cases in the Circuit Court. The courts of other states have consistently held that the violation of a municipal ordinance is not a criminal offense against the State, and therefore the State is not a party in such criminal cases. See Section 608, 43 Corpus Juris, page 446.

I am therefore of the opinion (1) that it is the duty of the State Attorney to represent the State in all appeals in criminal cases from the Justice of the Peace Court, Court of Crimes, and Criminal Court of Record, to the Circuit Court; and (2) that it is not the duty of the State Attorney to represent a municipality in criminal cases for the violation of a municipal ordinance on appeal from a Municipal Court to the Circuit Court, as the State is not a party in such cases.

October 4, 1943.—043-259.

#### ASSISTANT STATE ATTORNEYS—AUTHORITY

QUESTION: Has an Assistant State Attorney authority to file informations in cases less than capital?

*To Honorable Murray Sams, State Attorney, DeLand, Florida:*

Section 10, Declaration of Rights of the Constitution of the State of Florida, was amended at the General Election of 1934 to provide for the filing of informations in cases less than capital. Subsequent to the adoption of this amendment, the question posed in your request for an opinion was squarely passed upon by the Supreme Court of Florida in the case of *State ex rel Ricks v. Davidson*, Sheriff, 121 Fla. 196, 163 So. 588, in which the Court held that the right to file informations in the Circuit Court was limited by the Constitution of this State to the constitutional prosecuting officer of that Court, the State Attorney, and that an information filed by an Assistant State Attorney was null, void, and of no effect.

I am unable to find where the Supreme Court of Florida has subsequently reversed or modified the decision of the Court in the case of *State v. Davidson*, supra.

It is therefore my opinion that an Assistant State Attorney is not authorized to file informations in cases less than capital.

August 11, 1943.—043-198.

#### SALARY

QUESTION: What effect does Chapter 22069, Acts of 1943, have upon the salaries paid to State Attorneys and Assistant State Attorneys covered by the Act?

*To Honorable J. M. Lee, State Comptroller:*

After a very careful consideration of the question propounded I have come to the conclusion that in view of the clerical errors in the Act and the fact that the language used in the Act which would have increased the salary of the State Attorney and his assistant was in the nature of



interpretative language rather than enactment language, since there was no reference to the same in the title to the Act and in view of the fact that I am unable to find any case in the Supreme Court directly in point, I cannot advise you to pay out any funds under the same without first obtaining a court decision in the matter; but I assure you that if such a suit is brought, this office will cooperate in every way to expedite the cause.

### CLERKS OF THE CIRCUIT COURT

May 24, 1943.—043-117.

#### DEPUTY CLERK—POWERS AND DUTIES

**QUESTION:** May a Clerk of the Circuit Court appoint a Deputy Clerk and authorize such deputy to act for him in his capacity as ex officio Clerk of the Board of County Commissioners, including the execution of warrants and other instruments authorized or directed by the said Board? In other words, must the Clerk of the Circuit Court, when acting as ex officio Clerk of the Board of County Commissioners, act in person or may he act by and through his deputy?

*To Honorable Bryan Willis, State Auditor:*

Section 15, Article V, Florida Constitution, provides that "there shall be elected in each county . . . a clerk of the circuit court, who shall also be clerk . . . of the board of county commissioners, and recorder and ex officio auditor of the county" whose duties shall be prescribed by law. Section 6, Article VIII, Florida Constitution, provides that "the legislature shall provide for the election . . . of a clerk of the circuit court . . . (whose) powers, duties and compensation shall be prescribed by law." Section 4, Article XVI, Florida Constitution, provides that the Clerk of the Circuit Court "shall either reside or have a sworn deputy within two miles of the county seat."

Section 28.06, Florida Statutes, 1941, provides that the "clerk of the circuit court may appoint a deputy or deputies, for whose acts he shall be liable, and the said deputies shall have and exercise the same powers as the clerks themselves." (Emphasis supplied). Section 28.12, Florida Statutes, 1941, provides that "the clerk of the circuit court shall be clerk of the board of county commissioners." Section 125.17, Florida Statutes, 1941, provides that "the clerk of the circuit court for the county shall be clerk and accountant of the board of county commissioners. He shall keep their minutes and accounts, and perform such other duties as their clerk as the board may direct. He shall have custody of their seal, and shall affix the same to any paper or other instrument to which it shall be proper or necessary that the same shall be affixed. And he may give copies of writings in his custody as the clerk of said board, attested by his signature and authenticated by said seal."

Generally speaking the powers and duties of a Deputy Clerk of the Circuit Court may embrace the ministerial functions of the Clerk, although ordinarily any judicial functions of the Clerk are beyond the power of the deputy (15 C.J.S. 1271 and 1272, section 90). In this state a Deputy Clerk may perform the duties imposed upon the Clerk in drawing names from the jury box to serve as a grand jury (*Willingham vs. State*, 21 Fla. 761, text 775, et seq.); in taking the oath of a County Solicitor to an information (*State vs. Peeler*, 107 Fla. 615, 146 So. 188, text 189); and in the making of a certificate, which certificate "was none the less the act of the clerk because made by his authorized deputy" (*Summer vs. Mitchell*, 29 Fla. 179, 219, 10 So. 562, text 570, quoting from *Devl. Deeds*, section 475). In the absence of statutory provisions to the contrary, a deputy may perform any official ministerial act that may be done by his principal, except appoint a deputy (14 C.J.S. 1272, section 90).



When the above cited authorities are considered in connection with the statutory provisions authorizing the appointment of a deputy by the Clerk of the Circuit Court, which deputy is expressly given "**the same powers as the clerks themselves**" (Section 28.06, Florida Statutes, 1941), and the fact that the Clerk, both by statute and by provision of the Constitution, is made Clerk of the Board of County Commissioners (Section 28.12, Florida Statutes, 1941; Section 15, Article V, Florida Constitution), we are forced to the conclusion that the Clerk of the Circuit Court may perform any and all ministerial duties, including those when acting as Clerk of the Board of County Commissioners, by and through his deputy. The Clerk when keeping the minutes of the proceedings of the Board of County Commissioners and when executing warrants, contracts and other instruments pursuant to and in accordance with the directions of the Board, is merely acting in a ministerial and not a judicial capacity (see *First National Bank vs. Filer*, 107 Fla. 526, 145 So. 204, text 207).

The Clerk of the Circuit Court, being *ex officio* Clerk of the Board of County Commissioners, would seem to be required to keep a record of their proceedings. However, the usual practice is for the Board to review and either approve or correct such minutes after they have been written up by the Clerk. The Clerk's action in keeping the minutes would seem to be ministerial. It is the duty of the Board to determine if and when a claim shall be paid, and the Clerk in drawing a warrant for the payment of the claim acts in a ministerial capacity. The drawing of a contract directed to be made by the Board is likewise merely a ministerial duty. The Clerk signs the instrument for the purpose of attesting the action of the Board, unless expressly made the agent of the Board for some other purpose, in which case he does not act as Clerk but as agent of the Board.

I am, therefore, of the opinion that a Clerk of the Circuit Court may appoint a Deputy Clerk and authorize such deputy to act for him in his capacity as *ex officio* Clerk of the Board of County Commissioners, including the execution of warrants and other instruments authorized or directed by the said Board, so long as the same is merely a ministerial function of the Clerk and requires no judicial discretion. The acts of the deputy should be done in the name of the Clerk, the deputy executing or signing all papers, minutes and other instruments in the name of the Clerk by said deputy.

July 20, 1943.—043-168.

#### DUTIES AND RESPONSIBILITIES

**QUESTION:** Does Senate Bill 258, which passed the last Legislature, allowing the County Commissioners of Hardee County to employ clerical help, in any way relieve or take away from the Clerk of the Circuit Court any of his duties and responsibilities, as designated and outlined by the Constitution and Statutes of the State of Florida, particularly including his duties and responsibilities under the following:

1. Section 15, Article V, of the Constitution, providing that the Clerk shall also be Clerk of the Board of County Commissioners and *ex-officio* Auditor, and as *ex-officio* Auditor shall audit all claims that are presented for payment.

2. Section 116.07, Florida Statutes, 1941, covering the keeping of books of account and records in accordance with forms to be provided by the State Auditor. Under this section the Clerk keeps many records provided by the State Auditor, including:

- (a) Form No. 12, called the Voucher and Warrant Index Record;

- (b) Form No. 2, called the Fund and Depository Record;

- (c) Form No. 6, called the Distribution or Expenditures Record;

(d) Form No. 11, called the Record of Warrants Drawn; and he likewise keeps in his custody blank county warrants and checks.

3. Section 125.17 of the said statutes, covering the keeping of minutes of the Board, custody of the seal, affixing the seal, and so forth.

4. Section 129.01 of the said Statutes, providing that the Clerk is to make an estimate of taxes to be levied.

5. Section 124.03 of the said statutes, covering the duties of the Clerk with reference to the Districts of County Commissioners.

6. Section 128 et seq. of the said statutes, covering the many duties and responsibilities of the Clerk with reference to county finances.

In addition to whether or not the Clerk is relieved of any of the duties and responsibilities above named, under Section 28.52 of the Florida Statutes, 1941, are the County Commissioners still obligated to fix a reasonable salary to be paid to him, for his services as Clerk of the Board?

From a reading of Senate Bill 258, without at this time questioning its constitutionality, it appears that it simply allows the County Commissioners to employ an additional clerical helper, a part of whose duties may amount to a duplication of work which must be done by the Clerk of the Circuit Court, or his duly authorized deputy, and does not in any way relieve the Clerk or the County Commissioners of any of the responsibilities or duties which rested upon them prior to the passage of the said Senate Bill 258. This opinion is in a large measure based on the case of *State vs. Wheat*, 137 So. 277, involving a Dade County Act which in some of its provisions is similar to the Act now under consideration.

*To Honorable R. Clyde Simmons, Clerk of the Circuit Court, Hardee County, Wauchula, Florida:*

In reply I wish to advise that I have carefully considered the matter and have read the case you cited, and I am of the opinion that your construction of this case and the law that you have quoted is proper and is correct. I, therefore, fully concur in the same and hold that Senate Bill 258 authorized the County Commissioners to employ additional clerical help and that although his duties may amount to a duplication of work to be done by the Clerk of the Circuit Court, or his duly authorized deputies, that same does not in any way relieve the Clerk or the County Commissioners of any of the responsibilities or duties which rested upon the Clerk or the Commissioners prior to the passage of said Senate Bill 258.

November 2, 1943.—043-299.

#### FEES—MONEYS RECEIVED AND PAID OUT OF REGISTRY OF COURT

**QUESTION:** Chapter 21838, Acts of 1943, amended Section 5, Chapter 15920, Acts of 1933, and provided that in addition to certain other fees the Clerk of the Circuit Court is entitled to a fee for receiving into and paying out moneys from the registry of court; or for recording any certified transcripts of judgments in the judgment lien record as required by Section 55.10, Florida Statutes, 1941.

The Clerk did not receive notice of the statute until October 23, 1943. What should be done about the fees he should have collected on moneys received and paid out during the period between May 24, 1943, and October 23, 1943?

*To Honorable Bryan Willis, State Auditor:*

This chapter provided in general that in all counties having a population of more than 155,000 the fee, except as otherwise provided, for the Clerk's services in suits or proceedings was \$7.50, it apparently being the intention of the Legislature that there would be a flat fee for the Clerk's services in all suits that were filed. It did allow the Clerk to charge for preparing and verifying transcripts of records and for furnishing copies of records and papers but did not provide that he should charge anything for receiving deposits and paying same out when they were filed in connection with suits.

The amendment became effective May 24, 1943, and from that date on, the Clerk should have charged for receiving and paying out deposits and for recording transcripts of judgments. Because the language of the act is perspective and not retroactive I am of the opinion that on all deposits made before May 24, 1943, the Clerk should not make any additional charge for handling same, but that since May 24, 1943, on all moneys thereafter received there should be a proper charge therefor.

I note from a certain person's letter to the Clerk that the Clerk did not receive notice of this statute until October 23rd and said person takes the position that since we are all presumed to know the law even if the Clerk had no absolute knowledge of the passage of the act, nevertheless all moneys deposited in the registry of the court on May 24, 1943, and subsequently are subject to this law. With this reasoning I am in thorough accord and therefore so hold in answer to your question as to that particular part of same.

I conclude by restating my opinion so that there can be no misunderstanding: On all moneys received and paid out from the registry of the court prior to May 24, 1943, same was controlled by Chapter 15920 and no additional charge should be made. On all moneys received in and paid out from the registry of the court since May 24, 1943, Chapter 21838, Laws of Florida, Acts of 1943, controls and the proper charge should be made therefor.

March 21, 1944.—044-92.

#### FEES—RECORDING OF INSTRUMENTS

**QUESTION:** Are Clerks of the Circuit Courts using the photographic process for recording instruments precluded by Chapter 22051, Laws of Florida, Acts of 1943, from charging the following fees?

Filing instrument for records .....	10¢
Entering on registry docket .....	15¢

*To Honorable Bryan Willis, State Auditor:*

Section 2 of Chapter 22051, Laws of Florida, Acts of 1943, reads as follows:

"Section 2. In lieu of the fees now or hereafter prescribed by law for recording any instrument, other than an order, decree or judgment of any court filed for record in the public records of counties of this State using the photographic process of recording, the fee of the Clerk of the Circuit Court shall be, for each necessary exposure, not more than fourteen (14) inches by eight and one-half (8½) inches, as follows: Where the instrument consists of not more than one page, seventy-five cents for the first page, and sixty cents for each additional page or part thereof, which shall include the cost of indexing the record of such instrument, and no fee shall be allowed for the certification of the recordation of any such instrument, or for written or printed matter on the back or cover thereof, which does not form a part of such instrument." (Emphasis supplied).

Sections 4858 and 4867, C.G.L. 1927 have been brought forward as Sections 28.22 and 28.24, Florida Statutes, 1941, respectively.

Section 28.24 provides in part as follows:

"The compensation of the clerk of the circuit court, as clerk or recorder, shall be entirely by fees and, unless otherwise provided, shall be as follows:

"Filing any paper requiring to be filed ..... .10

\* \* \*

"Recording any paper, first 100 words or less ..... .25

Each additional 100 words or fraction thereof ..... .12½"

You will note that Section 28.24 treats the filing and the recordation of the instrument as two separate items in the list of items for which the clerk is allowed fees. Therefore, it is my opinion that the fee for filing has not been superseded by Section 2 of Chapter 22051 inasmuch as said Section 2 does not refer to filing but only to the fees for recording an instrument.

While it is true that Section 2 of Chapter 22051 provides that no fees shall be allowed for the cost of indexing the record of such instruments or for the certification of the recordation of any such instruments, such provision does not in my opinion have reference to the fee for registering or docketing an instrument.

Section 28.22, Florida Statutes, 1941 under Subsections (6) and (11) treats registration of instruments and indexes as two separate items. Section 28.24 provides the following as a fee item for the clerk: "Docketing—.15." Therefore, it is also my opinion that there is nothing in Section 2 of Chapter 22051, Laws of Florida, Acts of 1943, which precludes a clerk from charging the fee for entering the instrument on the register or docket.

October 28, 1943.—043-286.

#### JUDGMENTS—RECORDING

**QUESTION:** A final judgment was entered on demurrer in a common law case in the Circuit Court, and same was entered in the Clerk's judgment book wherein all judgments are recorded. Attorneys for the plaintiff are appealing the case and have requested that the Clerk record same in the "Minutes of the Court" in order to comply with Rule 2, Subdivision (C) of the Rules of the Supreme Court. The Clerk keeps a Circuit Court minute book in which he records only proceedings that have taken place in open court; in addition he keeps the judgment book and also a chancery order book in which he records all final orders and decrees.

1. Is not the judgment in question already recorded in the "Minutes of the Court" within the contemplation of Supreme Court Rule 2, Subsection C, adopted December 17, 1941, and effective April 1, 1942?

2. Are the record books which he is now keeping, as set forth above, in compliance with the provisions of Section 28.21, Florida Statutes, 1941?

3. If such records are not in compliance with Section 28.21, Florida Statutes, 1941, what changes should be made?

*To Honorable George E. Evans, Clerk of the Circuit Court, Alachua County, Gainesville, Florida:*

In reply I wish to advise that Supreme Court Rule 2, Subsection C reads as follows:

(c) **Notice of Appeal—Effective Filing.** The filing of the notice of appeal with the clerk of the court whose order, judgment or decree



is appealed from shall give the appellate court jurisdiction of the subject matter and of the parties to the appeal, but it shall nevertheless be recorded in the minutes of the court whose order, judgment, or decree is appealed from.

The paper that this rule refers to in my opinion means the notice of appeal and not the judgment and that you should record the notice of appeal in the minutes of the court. I also believe that you should record in the Circuit Court minute book all final judgments regardless of whether they are entered in open court or not in order to comply with Section 28.21, Florida Statutes, 1941. I understand it is the practice of most of the clerks to also record this judgment in a judgment book. This answers your question number 2.

While I have answered question number 3 I will say again that in order to comply with this section of the statutes you should record all judgments in the circuit court minute book.

March 17, 1944.—044-86.

### RECORDS AND RECORDING

**QUESTION:** Should a Clerk of the Court accept for record a warranty deed properly executed regardless of the fact that the description of the property is unintelligible?

*To Honorable Ed Scott, Clerk of the Circuit Court, Collier County, Everglades, Florida:*

You state that a warranty deed has been submitted to you for record dated August 20, 1925. The property in the deed is described as Lot No. 11 of Section 2, Township 52, Range 30, containing 10 acres. You also state that at one time a good many years ago a plat was submitted to the Board of County Commissioners which was not approved and therefore not filed and recorded and that the description therefore is quite unintelligible. You request me to advise you if you should record a warranty deed in which the description is quite unintelligible and confusing. You state further that you have searched the statutes and have been unable to find any restriction against recording such an instrument, but that if this deed is recorded it will cause confusion and possibly a cloud on the entire section.

In reply I wish to advise that I too have searched the statutes, as well as authorities in this state, and I find nothing directly in point on the question. I do not find in a great many cases that the Supreme Court has passed on the question of whether or not the description contained in a deed was sufficient. In many instances surveyors do not agree on whether or not descriptions contained in a deed are sufficient to enable them to locate a piece of property. I hardly think that a Clerk of the Court should take upon himself the responsibility of examining every deed that is submitted to him for record and passing upon whether or not the description contained therein is adequate.

I am of the opinion that when a deed is submitted to you that is properly executed in accordance with the laws of the State of Florida you should record the same, regardless of the fact that you may not think the description is sufficient, and leave it up to the courts to determine whether or not same should be allowed to remain upon the public records of your county.



## SHERIFFS

August 23, 1943.—043-224.

EXPENSE—APPREHENSION AND TRANSPORTATION  
OF ESCAPED PRISONER

**QUESTION:** A person convicted of murder in the second degree and sentenced to life imprisonment escaped prior to being transferred to Raiford and while he was still in the county of his conviction. A Sheriff of another county has located this person. If he apprehends this man and transports him to the county of his conviction, will the State bear the expense thereof?

*To Honorable Spessard L. Holland, Governor:*

I wish to advise that I am of the opinion that the expense should not be borne by the State because Section 954.22, Florida Statutes, 1941, provides:

"All prisoners shall be delivered to the superintendent at the prison, and no prisoner shall be received by him, unless the sheriff, United States Marshal or other officer having such prisoner in charge shall also deliver a commitment in due form, issued by authority of the court committing such prisoner."

It is quite obvious from this section that it is the Sheriff's duty to deliver the prisoner to the Superintendent of the State Prison at Raiford and until he receives him there is no responsibility upon his part to go out and gather in prisoners who have been convicted and pay the expenses of doing this as well as transporting such prisoners to Raiford.

You further state that the Sheriff who made the inquiry is under the impression that the Governor's office offered a reward at the time this man escaped and he wishes to know if the reward is still subject to payment.

Replying to this question I wish to call your attention to Section 838.06, Florida Statutes, 1941, and I believe that you will find it fully answers this Sheriff's question:

"It is unlawful for any officer, state, county or municipal, or any public appointee, or any deputy of any such officer or appointee, to exact or accept any reward, compensation, or other remuneration other than those provided by law, from any person whatsoever for the performance, nonperformance or violation of any act, rule or regulation that may be incumbent upon the said officer or appointee to administer, respect, perform, execute or to have executed; **Provided, that nothing herein shall be construed so as to preclude a sheriff or his deputies, city marshal or policeman from accepting rewards or remuneration for services performed in apprehending any criminal.**" (Emphasis supplied).

Since you do not state whether or not a reward was offered and the terms and conditions of same I cannot say whether it would still be payable. I am, however, of the opinion that if it was offered by a former Governor and since the Sheriff has not apprehended this man, pending advice from your office on the questions submitted, I would say that as to whether or not you would pay a reward is a matter for you to determine.

July 30, 1943.—043-186.

## EXPENSE—RETURNING PRISONER

**QUESTION:** Are Sheriffs entitled, under Section 30.24, Florida Statutes, 1941, to necessary expense for returning a prisoner to Florida, including gasoline actually used?

*To Honorable Henry M. Farrior, Sheriff, Washington County, Chipley, Florida:*

You state that you made a trip to California to bring back a prisoner; that your County Attorney ruled that you were entitled to seven cents per mile for travel, actual board and lodging, for yourself and prisoner, but that he declined to allow the bill for gasoline actually used in making the trip. You request my advice as to whether or not under Section 30.24, Florida Statutes, 1941, the gasoline bill should be paid as a necessary expense in connection with this trip.

Section 30.24 reads:

"The sheriffs of the several counties, when required to go beyond the limits of this state to bring back a prisoner charged with any offense, or who has been convicted of any crime in this state, and has escaped, shall charge the sum of seven cents per mile for the actual distance traveled beyond the limits of this state, together with the same mileage for his prisoner, and in addition thereto he shall receive the actual and necessary expense on account of returning the prisoner to the State of Florida." (Emphasis supplied).

I am of the opinion that since there is no per diem allowance made to compensate you for your services in returning this prisoner and in view of the fact that the emphasized portion of the foregoing section of our statutes provides that you shall receive the actual and necessary expense on account of returning the prisoner, you should be entitled to reimbursement for gasoline purchased by you and actually used in making the trip. If this construction is not placed upon the statute then it simply means that you might not receive any compensation whatsoever for your services in returning a prisoner to this state because I can conceive of a situation where the expense would be greater than seven cents a mile allowed you for each mile traveled and I cannot believe that this was the intention of the Legislature. It therefore seems to me the only reasonable construction to place upon this section is the one that I have given it.

June 24, 1943.—043-144.

#### FEES—COUNTY TRAFFIC OFFICERS

QUESTION: Does the opinion of the Attorney General dated January 13, 1943, conflict with the opinions of October 22, 1936, and September 13, 1941, as to arrests and service of criminal process in non-traffic violations of the laws of this state?

*To Honorable Bryan Willis, State Auditor:*

Each of the above opinions seems to relate to arrests and service of criminal process by county traffic patrolmen appointed pursuant to Chapter 18396, Laws of Florida, Acts of 1937, and similar laws.

The opinion of October 22, 1936, relates to fees and commissions for arrests and service of criminal process, and per diem for court attendance, by traffic patrolmen appointed pursuant to Chapter 12002, Laws of Florida, Acts of 1927; and in effect holds that such compensation as relates to proceedings concerning traffic violations should be paid into the fine and forfeiture fund and not to the Sheriff or other officer, and that such compensation as relates to proceedings concerning nontraffic violations should be paid to the Sheriff or other officer. The holding under the opinion of September 13, 1941, was substantially the same as the holding under the 1936 opinion.

The holdings of the opinion of January 13, 1943, insofar as they relate to the subject matter treated by the opinions of 1936 and 1941, are cast in such general terms as to require reference to the request for such opinion. By reference to the said request for opinion we find that only arrests and service of criminal process in connection with traffic

violations are involved; arrests and service of criminal process in connection with nontraffic violations are not involved. The opinions of 1936 and 1941 were not confined to traffic violations but extended to nontraffic violations as well.

Under Chapter 18396, Laws of Florida, Acts of 1937, and similar laws, the traffic patrolmen are employed by the Board of County Commissioners solely for the purpose of enforcing the traffic laws and rules of the road and are only indirectly concerned with the enforcement of other laws. In order to give these officers police powers they are commissioned Deputy Sheriffs by the Sheriff of the county wherein they are employed and as such are duly constituted Deputy Sheriffs. If the Sheriff has a valid objection to any person employed by the Board of County Commissioners, for duty as a road patrolman, he may refuse to commission him as a Deputy Sheriff (State vs. Gandy, 130 Fla. 407, 178 So. 166). Being a duly commissioned Deputy Sheriff it seems that the Sheriff might give him process to serve so long as it does not interfere with his duties as traffic patrolman. Under the statute the compensation of the traffic patrolmen is paid by the county from the Fine and Forfeiture Fund of the county, and such officers are prohibited from receiving, charging or collecting any other compensation than their monthly salary. To reimburse the Fine and Forfeiture Fund, for the payment of the salaries of the traffic patrolmen, the statute provides, in substance, that the fees such officer might have been entitled to under the general law, shall be collected and paid into the said Fine and Forfeiture Fund. These fees under the statutes relate to traffic violations only and not to nontraffic violations. The requirement that the fees relating to traffic violation cases be paid into the Fine and Forfeiture Fund, cannot be circumvented by observing the violation and later obtaining a warrant of arrest and claiming compensation for its service.

In my opinion if the Sheriff elects to have any of his deputies employed as traffic patrolmen serve any criminal process relating to nontraffic violations he may do so, provided such work will not interfere with their traffic work, and fees may be collected for such service and retained by the officer. For the purpose of preventing fraud, I am of the opinion that the statutes require that the traffic laws be enforced, insofar as possible, by the traffic patrolmen and that all fees for such service be paid into the Fine and Forfeiture Fund of the county.

Inasmuch as the opinion of January 13, 1943, should be construed as applying to arrests and service of process in traffic cases only, and not to nontraffic cases, when so construed there are no conflicts between said opinion and the opinions of October 22, 1936, and September 13, 1941.

December 28, 1943.—043-342.

#### FEES—PAROLE REVOCATION HEARING

QUESTION: May the Parole Commission legally compensate a Sheriff for services in attending a session of the Commission held for the purpose of determining whether the parole of a parolee should be revoked?

*To Honorable Joseph Y. Cheney, Chairman, Florida Parole Commission:*

Under the provisions of Section 30.23, Florida Statutes, 1941, a Sheriff is entitled to a fee of \$4.00 per day for attendance upon a court.

Under the provisions of Chapter 947, Florida Statutes, 1941, the Parole Commission is clothed with the power and authority to cause the arrest of a parolee who has been charged with violating the conditions of his parole, and then to conduct a hearing to determine, upon the basis of testimony presented to the Commission, whether the charge of parole violation is true. Thereupon, the Commission is authorized to enter its order continuing in effect, amending, or revoking the original order of

parole. In the discharge of these duties, it is my opinion that the Commission acts as a quasi-judicial body.

When the alleged parole violator is being held without bail, it is readily apparent that the prisoner must be in the custody of an officer at the time of and during the Commission's hearing.

It is my opinion that the attendance fee as charged by the Sheriff is proper and that your Commission is clothed with the authority to approve the same for payment.

March 25, 1943.—043-86.

#### INVESTIGATIONS OF CRIME—BILL FOR SERVICES

QUESTION: 1. Who should approve for payment bills for services rendered by Sheriffs in pursuance of orders to such officers to make investigation of crimes?

2. May Constables render like services in pursuance of like orders to them to make investigation of crimes?

*To Honorable Bryan Willis, State Auditor:*

Section 1, Chapter 20943, Laws of Florida, Acts of 1941, provides a per diem of six dollars to Sheriffs for "investigation of crimes when made under the direction of the State's Attorney, County Solicitor or other prosecuting officer" and further provides that bill for such services is "to be approved by the court." These provisions were introduced into the laws of this state for the first time by the 1941 Act.

The answer to the first question above stated depends upon the construction of the phrase "to be approved by the court." Does this phrase have reference to the court for which the person directing the investigation is prosecuting officer or does it have reference to committing magistrates generally?

Statutes should be given their plain and obvious meaning (*Maryland Casualty Company vs. Sutherland*, 125 Fla. 282, 169 So. 679) and where the meaning is clearly expressed by the language used, when considered in its ordinary grammatical sense, rules of construction and interpretation are unnecessary and inapplicable (*Clerk vs. Kreidt*, 145 Fla. 1, 199 So. 333). Effect should be given to plain and unambiguous language used in a statute (*Voorhees vs. Miami*, 145 Fla. 402, 199 So. 402). The above statute makes reference to prosecuting attorneys of particular courts, to wit, State's Attorney (Circuit Court), County Solicitor (Criminal Court of Record) and other prosecuting officers (County Courts, County Judges' Courts and Courts of Crimes). Justice of the Peace Courts have no prosecuting attorney. State Attorneys have power and authority to investigate or cause to be investigated all crimes within their circuits, whether triable by the Circuit Court or in some other court, and may present the same to their grand juries.

The Legislature evidently intended something more than preserving the peace by the investigation, because the Sheriff and all judicial officers are conservators of the peace (Section 36, Article V, Florida Constitution; Sections 144.01 and 901.01, Florida Statutes, 1941) and are by law authorized and required to preserve the peace. The investigation doubtless was intended as an aid to the prosecuting officer in determining whether the case should be presented to the grand jury, whether an information should be filed, or in preparing the case for trial, and not as a measure for preserving the peace which the Sheriff is duty bound to do without any direction. State Attorneys may make investigation of crimes triable in any of the courts of the state.

Section 37.20, Florida Statutes, 1941, provides that "the fees of constables shall be the same as are at this time allowed sheriffs for like



services." This section was enacted prior to Chapter 20943, Laws of Florida, Acts of 1941, so that the Sheriffs' fees provided by said chapter are inapplicable to Constables (see *Williams vs. State*, 100 Fla. 1570, 131 So. 864). Prior to the enactment of said Chapter 20943 there was no provision of law providing a fee for making investigation of crime by the Sheriff; consequently there is no such provision with regard to constables now applicable to them.

I am, therefore, of the opinion that the phrase "to be approved by the court," contained in the 1941 act, has reference to the court for which the officer directing the investigation has power and authority to direct the same, and not to committing magistrates authorized to issue warrants, hold preliminary hearings and hold for trial. The State Attorney has power to direct the investigation for any of the Criminal Courts until the time an indictment is returned or an information is filed; other prosecuting attorneys only have power to direct the investigation of crimes triable by their courts.

Therefore, the above questions should be answered as follows, to wit:

1. The court whose prosecuting attorney directed the investigation, or, in the case of the State's Attorney, the court for which the investigation was directed or the court having jurisdiction to try the crime charge, should approve the bill for services.

2. There being no provision in the statutes for compensation for services rendered by Constables in connection with such investigations, no such bill for services may be approved for them. Because of this fact no Constable should be called upon to make such investigations, unless the services are to be performed without compensation.

Justices of the Peace have no prosecuting attorneys under the general law. I see no reason why the bills for services above mentioned may not be mailed to the court for its approval.

April 1, 1943.—043-83.

#### MILEAGE FEES

QUESTION: 1. Where an officer has a warrant for a prisoner and goes after him and returns him to jail, is he allowed to charge mileage two ways or three ways?

2. Where an officer has a warrant and goes after a prisoner and returns with a good bond instead of the prisoner, how many ways mileage should he charge?

*To Honorable T. A. Crews, Constable 5th District, Suwannee County, Branford, Florida:*

1. The Supreme Court in the case, *Traylor et al, as County Commissioner of Sumter County and Roy Caruthers, Clerk of Circuit Court vs. W. T. Coleman, Sheriff of Sumter County*, 9 So. 2d. 417, wherein the Sheriff returned a prisoner, held that he would be entitled to a three way mileage.

2. In answer to this question I am of the opinion that it would only be proper to charge a two way mileage in view of our statute to prohibit a charge of constructive mileage.

June 4, 1943.—043-131.

#### MILEAGE—RETURNING PRISONERS FROM ANOTHER COUNTY

QUESTION: Where a Sheriff of one county goes into another county to return prisoners, arrested in such other county and held for him, to his county, to what fees is he entitled for such return of prisoners, where there are more than one returned at the same time?



*To the Board of County Commissioners, Arcadia, Florida:*

In the case of Traylor vs. State ex rel., Coleman, Sheriff, 151 Fla. 322, 9 So. 2nd. 417, it was contended that the Sheriff was entitled to mileage each way for his services but was not entitled to additional mileage for the prisoner; with which contention the Court disagreed and held that he was entitled to mileage for himself and also for the prisoner. This holding was based upon the provision in the Sheriff's Fee Law for "removal of prisoner to or from jail, per mile each way . . . 12½ (cents)." Under the construction placed upon the statute by the Supreme Court I am of the opinion that the Sheriff is entitled to mileage, from Sebring to Arcadia, for each prisoner returned by him.

Under the law this office can render official opinions to state officials and boards only, therefore this opinion should be taken as unofficial.

August 25, 1943.—043-217.

#### NEPOTISM—STATUTE WAIVER

QUESTION: Has the Governor authority to waive the Nepotism Statute?

*To Honorable Spessard L. Holland, Governor:*

I wish to advise that the Nepotism Statute reads as follows:

"Any state officer, member of state board, county officer, member of county board or commission, city official, or his appointee, who shall knowingly employ, either directly or indirectly, any person related within the fourth degree, either by consanguinity or by affinity, to such state officer, member of state board, county officer, member of county board or commission, city official, or his appointee, shall be deemed guilty of misfeasance and malfeasance in office and subject to removal therefor; provided, however, that the provisions of this section shall not apply to the officers above who employ only one person related to them as above set out."

Section 116.11, Florida Statutes, 1941, provides that anyone violating the above statute shall forfeit all compensation, etc., during the time of such violation. The law does not provide that anyone can waive its provisions and I know of no general law that would authorize you to waive the same.

I am therefore of the opinion that you have no discretion in the matter and cannot state that you will waive the Nepotism Statute.

June 16, 1944.—044-176.

#### TRANSPORTATION OF VENEREAL PATIENTS—MILEAGE

QUESTION: What amount of mileage may be charged by a Sheriff or his deputy for transporting prisoners to the Venereal Quarantine Camp at Ocala?

*To Honorable Emil Yde, Sheriff, Lake County, Tavares, Florida:*

Chapter 21948, Laws of Florida, Acts of 1943, provides for the quarantine and treatment of such persons, their transportation, etc. Section 5 of that Act is as follows:

"The sheriffs of the several counties of the State shall receive the same fees and mileage for service rendered under this Act as are prescribed for like service in criminal cases, such fees and mileage to be paid out of the Fine and Forfeiture Fund of the county involved."

Under Section 30.23, Florida Statutes, 1941, the Sheriff is permitted to charge 12½¢ per mile each way for the removal of a prisoner to or from jail.

In *Traylor et al. vs. State ex rel. Coleman*, 9 So. 2d 417, the Supreme Court held that in addition to his charges of 12½¢ per mile each way, the Sheriff was also entitled to charge 12½¢ per mile for the prisoner.

It is my opinion therefore that in transporting a prisoner to the camp 12½¢ per mile may be charged for the Sheriff or his deputy and 12½¢ per mile for the prisoner. In addition to the foregoing charges, 12½¢ per mile for the Sheriff or his deputy on the return trip may be charged.

### CRIMINAL COURT OF RECORD

July 19, 1943.—043-172.

#### ASSIGNMENT OF JUDGE—ESCAMBIA COUNTY COURT OF RECORD

**QUESTION:** Is the Governor authorized under the Constitution and Laws of Florida to assign the Judge of the Court of Record of Escambia County to serve as Judge in the Criminal Courts of Record of our State?

*To Honorable Spessard L. Holland, Governor:*

I wish to advise that under Section 32.06, Florida Statutes, 1941, you undoubtedly have the authority to transfer the Judge of one Criminal Court of Record to another Criminal Court of Record for the causes mentioned in this section.

Section 39 of Article V of our Constitution created the Court of Record of Escambia County. This was done by simply taking over the Criminal Court of Record for that county as it then existed.

Section 41 of Article V provides:

"All the provisions of the Constitution and all laws enacted in consonance therewith pertaining to the said Criminal Court of Record and the officers thereof including the manner of the appointment or election and the terms of office and compensation of said officers, shall apply with like effect to the said Court of Record and the officers thereof, except as provided by these amendments. . . ."

None of the amendments prohibited the transfer of the Judge of the Court of Record of Escambia County to a Criminal Court of Record of some other county, and while a narrow construction might be placed upon the above quoted language of Section 41 of Article V of our Constitution, I am inclined to believe that it should take a broader interpretation for the reason that the 1943 Act of the Legislature, to wit, Chapter 21770, Laws of Florida, Acts of 1943, provides for the interchange of judges between a Court of Record of Escambia County and the Circuit Court of said county.

In view of the fact that the Judge of the Court of Record of Escambia County can interchange with the Judge of the Circuit Court of Escambia County which, of course, is a court of higher jurisdiction, it is proper to say that he should be assignable to a court of lesser jurisdiction than his own; to wit, a Criminal Court of Record, and, therefore, since he will be really performing the functions in other courts that he could perform in his own court, I feel that I should for this reason depart from my opinion to you under date of December 5, 1942, and now hold that the Judge of the Court of Record of Escambia County can be assigned or transferred to preside in a Criminal Court of Record of some other county. However, I do not mean to be understood as holding that a Judge of a Criminal Court of Record could be transferred and assigned to preside in the Court of Record in Escambia County.

Nevertheless, due to the fact that some one might question such transfer and assignment of the Judge of the Court of Record to a Criminal Court of Record and thereby delay criminal prosecution, I suggest that you procure an opinion from the Supreme Court in the matter.

October 24, 1944.—044-311.

**GOVERNOR'S AUTHORITY—ASSIGNMENT OF STATE ATTORNEY  
TO PROSECUTE CASES**

**QUESTION:** May the State Attorney of the First Judicial Circuit be assigned to prosecute certain criminal cases in the Court of Record of Escambia County, and before the Justice of the Peace where such criminal prosecutions were instituted?

*To Honorable Spessard L. Holland, Governor:*

Under the Constitution of this State there is a County Solicitor of the Court of Record of Escambia County, Florida, who is the prosecuting attorney of that court. No express provision is made by the Constitution or statutes of this state authorizing the Governor to assign a County Solicitor or State Attorney to prosecute criminal cases in the Court of Record of Escambia County, or the Criminal Courts of Record of any other county.

Section 41 of Article V of the Constitution of Florida provides that all the provisions of the Constitution and all laws enacted in consonance therewith, pertaining to Criminal Courts of Record and the officers thereof, shall apply with like effect to the Court of Record of Escambia County.

In an advisory opinion to the Governor dated December 17, 1942, in which you asked the Supreme Court of Florida if you had authority to assign a State Attorney or County Solicitor to represent the State in the prosecution of criminal cases in a Criminal Court of Record, that Court advised that you did have the authority to assign a County Solicitor, but the opinion is silent as to your authority to assign a State Attorney. See Advisory Opinion to the Governor, 10 So. 2d. 926.

In view of the fact that the Supreme Court of Florida held that the Governor is authorized to assign a County Solicitor, although there is no express provision of law for such assignment, and the further fact that Section 31, Article V, of the Constitution of the State of Florida, provides that the residing State Attorney in the county shall be eligible for appointment as County Solicitor, it would appear that you may have authority to assign said State Attorney to the Court of Record of Escambia County, he being the resident State Attorney. However, since such assignment, if unauthorized by law, would vitiate any information filed by the State Attorney, I think it proper that you ask the Supreme Court for an advisory opinion, as this would be the only safe procedure to follow.

I call your attention to the fact that you do have the authority to assign a County Solicitor from another county to try criminal cases in the Court of Record of Escambia County, and I also mention the fact that Section 32.17, Florida Statutes, 1941, provides that the Judge of the Court of Record of Escambia County may appoint an acting County Solicitor in the event the County Solicitor is disqualified or unable to act.

It is unnecessary to assign a State Attorney or County Solicitor to prosecute these cases before a Justice of the Peace, for the reason that a valid assignment to prosecute such cases in the Court of Record of Escambia County—such court having trial jurisdiction of the cases—is sufficient authority to prosecute the cases before a Justice of the Peace.

December 16, 1943.—043-334.

**INDICTMENTS AND INFORMATION**

**QUESTION:** What power have prosecuting attorneys of County Courts and County Solicitors of Criminal Courts of Record to enter a nolle prosequi in criminal cases and to change or reduce criminal charges?

*To Honorable J. J. Gilliam, Director, Department of Public Safety:*

For your information, Sections 32.18, 32.19, 34.12, 34.13, 34.14, 932.47 and 932.48, Florida Statutes, 1941, prescribe the general duties, powers and methods of prosecution of County Solicitors and prosecuting attorneys.

I find no statute regulating the power of the prosecuting officer to enter a nolle prosequi. The weight of authority and the common law rule are that in the absence of such a statute the matter of entering a nolle prosequi rests entirely within the discretion of the prosecuting officer, without the necessity of his securing the Court's consent, before the jury is empaneled. While a criminal case is before the jury the practice is different in the several states, and in some states the prosecutor must obtain leave of the Court to enter a nolle prosequi, while in other states it is not necessary that he do so. See 14 Am. Jur. page 967, 22 C.J.S. 707. However, aside from the question of the power of the prosecuting officer, it is the custom in this state for prosecuting officers to obtain the Court's consent to the entry of a nolle prosequi, after the trial has begun by the empaneling of a jury, or otherwise.

I likewise find no statute regulating the power of a prosecuting officer in changing or reducing a criminal charge after he voluntarily enters a nolle prosequi or otherwise abandons the original charge or complaint. Sections 32.19, 34.12 and 932.47, Florida Statutes, 1941, provide that informations may be filed by prosecuting officers without leave of the Court. Furthermore, it has already been noted that the prosecuting officer has the power to enter a nolle prosequi in a criminal case before trial and this indicates the original charge, complaint or information may be abandoned leaving the way open for the prosecutor to file a new information.

Therefore, I think that the present custom and practice followed by prosecuting officers in this state of changing or reducing before trial charges contained in original complaints or informations, are matters lying within their sole power and sound discretion. However, the law contemplates that a prosecuting officer will perform his duty and in representing his client, the State, will act in all good faith, and that he will never arbitrarily or unlawfully reduce or change a higher offense to a lesser offense, but will only change or reduce a charge where the facts and circumstances justify his doing so.

After an indictment or information has been quashed on motion of the accused, it is apparently necessary that the Court's consent be secured by the prosecutor before a new information is filed. Section 909.05, Florida Statutes, 1941.

## COUNTY COURTS

October 20, 1944.—044-307.

### DOCKET FEE IN CIVIL CASES

**QUESTION:** Is the \$3.00 docket for each civil case filed chargeable as costs in the case or should it be paid by the county?

*To Honorable Hiram W. Bryant, Justice of the Peace, Lee County,  
Fort Myers, Florida:*

The County Court of Lee County was established by Chapter 9355, Acts of 1923. Section 3 of the Act is as follows:

"The County Judge of said County shall be the Judge of said Court, and shall receive a salary of \$1,200.00 per year, to be paid monthly by the Board of County Commissioners; and also a docket fee of \$3.00 for each civil case filed in said Court."

Answering your question, it is my opinion that the fee of \$3.00, which is called a docket fee, should be charged as a part of the costs in the case and is not payable by the county.



## COUNTY JUDGES' COURTS

April 10, 1944.—044-122.

## JURISDICTION—COURT OF RECORD

- QUESTION: 1. Is a County Judge a Probate Judge?  
2. Is a County Judge's Court a Court of Record?

To Honorable Spessard L. Holland, Governor:

In reply I wish to advise that Section 36.01, Florida Statutes, 1941, Subsection 3, provides that County Judges shall have:

"Jurisdiction of the settlement of estates of decedents and minors; to take probate of wills; to order the sale of real estate of minors; to grant letters testamentary, of administration and of guardianship; and to discharge the duties usually pertaining to courts of probate."

This answers your first question as to whether or not a County Judge is a Probate Judge.

Section 36.02 reads as follows:

"County Judge's courts shall be courts of record, and county judges shall have authority to make all orders or decrees, and to issue every and all process necessary to maintain and carry out their constitutional jurisdiction, or to enforce their authority, and to enter and enforce their judgments and decrees in all matters wherein they have jurisdiction."

This answers your question as to whether or not a County Judge's Court is a Court of Record.

July 25, 1944.—044-214.

## JURISDICTION TO TRY ESCAPED COUNTY PRISONERS

QUESTION: Has the County Judge's Court jurisdiction to try escaped county prisoners?

To Honorable Louise Butler, County Judge, Perry, Florida:

Subsection (4) of Section 36.01, Florida Statutes, 1941, fixes the trial jurisdiction of County Judges' Courts in criminal cases. Under this section the County Judge's Court has jurisdiction to try all misdemeanors punishable by fine not exceeding \$500.00 or imprisonment not exceeding six months, or both.

Section 54.30 denounces the crime of prison escape and provides punishment therefor not to exceed one year. This section applies only to state prisoners and not county prisoners.

We have no statute in this state denouncing the crime of escape of county prisoners. Common law crimes are a part of the Law of Florida except where superseded by the Constitution or statutes of this state. See Sections 2.01 and 775.01, Florida Statutes, 1941. Escape is a common law crime applicable in this state to county prisoners. See *State ex rel Farrior v. Faulk*, et al., 102 Fla. 286, 136 So. 601. The punishment for common law crimes is fixed by Section 775.02, Florida Statutes, 1941, by fine not exceeding \$500.00 or imprisonment not exceeding twelve months.

It is apparent, therefore, that the County Judge's Court does not have jurisdiction to try either the statutory crime of the escape of a state prisoner or the common law crime of the escape of a county prisoner, but such jurisdiction is vested in the Circuit Court of your county. You do, however, have jurisdiction as a committing magistrate to issue a warrant for anyone committing either of these crimes and to bind such person over to the Circuit Court for trial.



Section 951.07, Florida Statutes, 1941, makes the violation of rules by prisoners a substantive offense and provides punishment therefor as a misdemeanor. This section places the responsibility of making such rules upon the Commissioner of Agriculture. The punishment provided for the crime denounced by this section is fixed by Section 775.07, Florida Statutes, 1941, at a fine not exceeding \$200.00 or imprisonment not exceeding ninety days. The County Judge's Court does have jurisdiction to try prisoners under the provisions of Section 951.07.

### JUSTICES OF THE PEACE

August 4, 1944.—044-224.

#### ASSIGNMENT BY GOVERNOR

QUESTION: May the Governor of the State of Florida assign a Justice of the Peace to hold court and try cases in another Justice of the Peace District in which the resident Justice of the Peace is deceased and no successor has been appointed?

To Mr. J. L. McClure, Executive Secretary, Office of the Governor:

I am unable to find where the Governor has authority to assign a Justice of the Peace under the Constitution or Laws of this State except by the provisions of Section 38.09, Florida Statutes, 1941, where an order of disqualification of the resident Justice of the Peace has been entered. A deceased Justice of the Peace is unable to enter an order of disqualification and, therefore, the provisions of this section are not applicable to the instant inquiry.

The assignment of a judge is the exercise of a judicial power which may be vested in the executive only by express provision of law, and no such power is inherent in the Governor as Chief Executive. Neither does such power exist under the common law.

I am therefore of the opinion that the Governor of the State of Florida is without authority to assign a Justice of the Peace to hold court and try cases in a district where the resident Justice is deceased.

Authorities supporting this opinion may be found in the original file.

December 3, 1943.—043-321.

#### CRIMINAL JURISDICTION; AUTHORITY

QUESTION: What is the extent of the criminal jurisdiction of Justices of the Peace, in counties having Criminal Courts of Record, in regard to:

1. The discharge of persons brought before them who are charged with crime;
2. Authority to accept pleas of guilty?

To Honorable J. J. Gilliam, Director, Department of Public Safety:

Section 37.01, Florida Statutes, 1941 provides in part as follows:

"Each justice of the peace in this state shall have:

- (2) Jurisdiction, in counties having a population of over fifty thousand according to the last preceding state census and no county court or criminal court of record, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months.

(3) Jurisdiction, in counties having a population of over fifty thousand according to the last preceding state census and a county court, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding one hundred dollars or by imprisonment not exceeding three months."

There is also a General Act, Chapter 22118, Laws of Florida, Acts of 1943, which provides that Justices of the Peace whose courts are located forty miles or more from the county seats of counties having Criminal Courts of Record shall have power to try misdemeanor cases in which the penalty is not more than one hundred dollars fine or ninety days in jail, or both.

In addition to the jurisdiction given Justices of the Peace by the general laws referred to above, the Legislature has enacted a few local acts giving Justices of the Peace trial jurisdiction in misdemeanor cases in their districts in counties other than those contemplated by the foregoing general laws.

You will note that whether or not criminal trial jurisdiction is conferred on Justices of the Peace by these general laws in particular counties of the state, is made dependent upon certain factors, namely, existence or nonexistence of a County Court or a Criminal Court of Record in the county, or both, a particular population therein, or whether the Justice of the Peace Court is located forty miles or more from the county seats in counties having Criminal Courts of Record. You will also note that such trial jurisdiction is further restricted in certain counties to misdemeanor cases carrying specified maximum punishments.

I think this gives you, as far as we are able to do so, the extent of the criminal trial jurisdiction of Justices of the Peace in counties having Criminal Courts of Record. It will be necessary for you to ascertain in each particular county from the local courts therein the extent of their jurisdiction, bearing in mind the information that I have given you.

I do not attempt to pass upon the constitutionality of the foregoing general laws or special acts conferring criminal trial jurisdiction on Justices of the Peace since it would hardly be seemly for me to do so.

As distinguished from criminal trial jurisdiction, it is clear that pursuant to Section 22 of Article V of the Constitution and Section 901.01 and Section 37.03, Florida Statutes, 1941, that in every county a Justice of the Peace therein may issue process for the arrest of all persons charged with felonies and misdemeanors not within his jurisdiction to try and make the same returnable before themselves or County Judges for examination, discharge, commitment or bail of the accused.

Sections 901.23, and 902.01 to 902.19 inclusive, Florida Statutes, 1941, among other things provide that all committing magistrates, including Justices of the Peace, may hold preliminary hearings to ascertain probable guilt of persons arrested with or without a warrant and brought before them, and after holding such hearings such committing magistrates are empowered to hold the defendant to answer the charge in the court having jurisdiction to try it, or may discharge the defendant where it appears no offense has been committed, or if committed, there is not probable cause to hold him for trial. However, when a defendant is so discharged he cannot be required to pay court costs as a condition to being discharged or otherwise. Section 16, Declaration of Rights, Florida Constitution.

A Justice of the Peace having trial jurisdiction of a criminal case may accept a plea of guilty from the defendant pursuant to Section 909.15, Florida Statutes, 1941, but if he does not have jurisdiction to try the case he cannot accept a plea of guilty.

January 12, 1943.—043-10.

#### FEEs—COMMITTING MAGISTRATES

**QUESTION:** Is a flat fee of \$5.00 provided in Subsection (2), Section 36.18, Florida Statutes, 1941, for the County Judge in criminal cases in counties of more than 175,000 population, applicable to a Justice of the Peace acting as a committing magistrate, and what is the effect of this provision of law relative to prepayment of such fees?

*To Honorable Luther W. Cobbe, County Attorney, Hillsborough County, Tampa, Florida:*

This statute is expressly applicable to County Judges only and there is no other provision of law making it applicable to a Justice of the Peace or other committing magistrate.

This statute, by express terms, applies to "any criminal action or proceeding before the county judge" and provides "as and for fees for all such services to be performed by him in such criminal action or proceedings, in lieu of all other fees heretofore charged, except as hereinafter provided the sum of \$5.00."

That part of Subsection (2), Section 36.18, supra, which provides for the prepayment of cost is identical with Section 939.16, Florida Statutes, 1941, with the exception of the words "by him suffered" which are contained in the latter and omitted in the former. Although the Supreme Court of Florida has never passed upon Subsection (2), Section 36.18, supra, the Court has construed Section 939.16, supra, not to apply to "crimes of a public nature" but only to those classes of crimes "where the complaining witness has suffered special damage in his own person or private property" or, in other words, crimes of a private nature, and this construction would also be applicable to Subsection (2), Section 36.18. See *Simmons, et al., County Commissioners vs. State, ex rel., Tew*, 71 So. 278, and *Osceola County vs. State, ex rel., Newton*, 155 So. 119.

It is therefore my opinion: (1) That the flat fee provided for the County Judge in criminal cases by Subsection (2), Section 36.18, Florida Statutes, 1941, is not applicable to a Justice of the Peace; (2) That this fee of \$5.00 is the only fee chargeable by the County Judge in criminal cases and is in lieu of all other fees for services performed by him, while such cases are pending before him; and (3) That in order for the county to be liable for the payment of such fees, (a) the person applying for such warrant must be a law enforcement officer of the State of Florida, or (b) the crime for which the application for a warrant is made must be a "crime of a public nature," or (c) the person making application for the warrant must make an affidavit of insolvency and of substantial injury to person or property.

September 8, 1944.—044-266.

#### JURISDICTION—TRIAL OF MISDEMEANOR CASES

**QUESTION:** In a county of less than fifty thousand population and having a County Court, has a Justice of the Peace jurisdiction to try misdemeanors and recover statutory costs for services connected with a trial of such a case?

*To Honorable John H. Treadwell, Jr., County Attorney, DeSoto County, Arcadia, Florida:*

It appears that a Justice of the Peace in DeSoto County has submitted to the County Commissioners a bill for costs in a misdemeanor case in which he appears to have accepted a plea of guilty, the cost bill including statutory fees for services in connection with the trial and proceedings subsequent to and resulting from the trial. It also appears that DeSoto is

a county having a population of less than fifty thousand and having a County Court.

In an opinion dated August 27, 1942, I held that a Justice of the Peace had no trial jurisdiction in criminal cases in any county having a population of fifty thousand or less according to the last preceding state census, except in certain counties where such jurisdiction is given by local laws, none of which, I believe, affect DeSoto County.

I adhere to that opinion except insofar as subsequently enacted Chapter 22118, Acts of 1943, (Section 37.24, Cumulative Supplement 1943), gives criminal jurisdiction to certain Justices of the Peace in counties having a Criminal Court of Record, regardless of population. As DeSoto County has no Criminal Court of Record, this act would not apply to justices in said county.

It is my opinion that a Justice of the Peace in DeSoto County has no jurisdiction to try any criminal case and therefore is not entitled to charge any costs resulting from or connected with such trial.

December 18, 1944.—044-346.

#### SHERIFF AND CONSTABLE—RESPECTIVE RIGHTS TO SERVE PROCESS

QUESTION: 1. Who or what shall determine whether the Constable or the Sheriff shall act as bailiff in the Justice of the Peace Court?

2. Who or what shall determine, between the Constable and the Sheriff, who shall serve the process of said Court?

3. When the Sheriff makes a case in said Court does he or the Constable serve the process in that particular case or is such a matter left to the discretion of the Justice of the Peace?

4. In private cases as well as cases made by other law-enforcement agencies does the Constable or the Sheriff serve the process of said Court or is this left to the discretion of the Justice of the Peace?

*To Honorable Joseph G. Spicola, Justice of the Peace, Hillsborough County,  
Tampa, Florida:*

Both the Sheriff and the Constable are constitutional officers, and the State Constitution provides that the respective powers and duties of each shall be prescribed by statute.

Section 37.16, Florida Statutes, 1941, reads in part as follows:

"The sheriff or any constable of the county shall be the executive officer of the courts of justice of the peace, but if the sheriff or constable shall, for any reason, be disqualified or unable to act, the justice of the peace may appoint any individual, not interested in the case on trial, to serve process and to perform all duties of such executive officer . . ."

All four of your questions appear to be governed by Section 37.16 supra, which prescribes identical powers and duties for both the Sheriff and the Constable insofar as serving process issued by a Justice of the Peace or acting as executive officer of that court is concerned. The inherent power of a court to control its functions and process would leave it to the discretion of the Justice of the Peace to determine whether the Sheriff or Constable would serve the process of such court or act as bailiff thereof, in view of the fact that both the Sheriff and Constable are authorized by law to perform these duties.

Further answering question No. 4, I will state that whether the Sheriff or Constable shall serve process in civil cases is a matter that should be left to the party having such process issued, or his attorney, in view of the



fact that such party is required to pay the cost of such service. However, if no special request is made as to who shall serve such process, then it is a matter for the discretion of the Court.

August 9, 1943.—043-194.

#### VENUE IN PEACE BOND PROCEEDINGS

**QUESTION:** What is the law governing venue in peace bond proceedings before Justices of the Peace?

*To Honorable Albert Bowie, Justice of the Peace, Second District, Duval County, Dinsmore, Florida:*

This is a quasi-criminal proceeding, and the only provisions of law relative thereto are Section 37.21, Florida Statutes, 1941, providing the procedure, and Sections 923.04-923.08, Florida Statutes, 1941, prescribing forms therefor.

Section 37.21 vests the Justice of the Peace with jurisdiction to issue peace warrants and hold a hearing or examination thereon, and to finally dispose of such cases by either discharging the defendant or binding him over under bond to keep the peace, and committing him to jail upon failure to give such bond. But there is no provision of law expressly fixing the venue in such cases.

The form of petition for peace warrants set forth in Section 923.04, and the form of peace warrants set forth in Section 923.05, are both worded so as to relate to a cause of complaint occurring in the district and county of the Justice of the Peace in which the petition is filed and peace warrant issued.

In view of the absence of any express provision of law as to the venue in such cases, other than as may be implied from the forms contained in Sections 923.04 and 923.05, and in view of the fact that the Supreme Court of this State has never decided this question, it would appear that the venue in such cases would be confined to the Justice of the Peace District where the threat or other cause of complaint occurred. However, after a threat or other sufficient cause of complaint has taken place, and the offender has attempted to or is on his way to consummate the same in some other district or county, such action on his part would be sufficient as a cause of complaint in whatever district or county it might take place, and the Justice of the Peace of such district would have jurisdiction to hear the case.

As you know, the Attorney General is not permitted by law to render official opinions to anyone except State officers, boards, and departments, and this letter is not to be considered as such. However, I trust that the information contained herein may be beneficial.

#### JURORS AND JURY LISTS

August 4, 1943.—043-191.

#### UNLAWFUL DETAINER SUITS—JURORS; PAYMENT

**QUESTION:** Who is responsible for the payment of jurors in two unlawful detainer suits, one in the Circuit Court and one in the County Judge's Court?

*To Miss Kate Gillis, Clerk of the Circuit Court, Walton County, DeFuniak Springs, Florida:*

I have very carefully considered your request and in connection therewith I have examined the following statutes and authorities:



Section 40.25, Florida Statutes, 1941, provides that the mileage and per diem of jurors summoned specially to try civil cases for any court shall be taxed as costs and paid by the parties to the cause as other costs are paid and further that the party demanding such jury may be required to deposit an amount sufficient to cover the costs of such trial. However, the Supreme Court in the case of *State vs. Peacock*, 171 So. 821, held that since the right to trial by jury is guaranteed by the constitution, such right is absolute and the parties to a civil suit can demand and have a trial by jury without being required to deposit sufficient money to cover the costs of such jury trial as required by Section 40.25, *supra*.

I apprehend that you did not secure this deposit for the costs of the jury. In many instances the parties will make this deposit regardless of the holding of the Supreme Court. If the trial of the unlawful detainer suit was had at a regular term of either the Circuit Court or the County Judge's Court, then of course such jury would be paid as provided by law for the reason that the kind of case tried by jury at a regular term of court has no bearing upon the payment of the jury.

Where unlawful detainer suits are tried in either the Circuit Court or County Judge's Court by jury other than at a regular term of court the parties to the suit cannot be required to deposit money to cover the costs under the holding of our Supreme Court in the above cited case. However, Section 41.08, Florida Statutes, 1941, providing for the compensation of jurors in the County Judge's Court, provides for the payment of all jurors and is sufficient to cover cases where the jury is summoned to try a case other than at a regular term of court. In an opinion on page 91 of the Biennial Report of the Attorney General for 1939-1940, it was held that jurors summoned specially to try a case under Section 40.25 should be paid as provided by Section 41.08 and I believe that this holding is correct.

Section 40.24, Florida Statutes, 1941, provides for the payment of the regular panel and jurors summoned to complete a jury after the regular panel is exhausted in the Circuit Courts of this state. Section 40.24 does not provide specifically for the payment of jurors summoned specially to try civil cases. However, I am of the opinion that where a special term of court is called for the purpose of trying such a case the jury drawn therefor would be the equivalent of the regular panel for such term and therefore should be compensated under the provisions of Section 40.24, *supra*.

I am, therefore, of the opinion that in the trial of unlawful detainer suits, in both the Circuit Court and the County Judge's Court, whether at a regular term of court or not, jurors should be paid under the same provisions of law and in the same manner as jurors attending regular terms of such courts; provided, however, that in unlawful detainer suits which are not tried at a regular term of the County Judge's Court but are tried before jurors summoned specially for that purpose, costs of such jurors should be taxed as costs against the losing party to said cause and if recovery is had thereupon it should be credited to the county.

## CHAPTER V

### CIVIL PRACTICE AND PROCEDURE

#### ACTIONS AT LAW

December 13, 1943.—043-327.

##### COUNTY OFFICER'S BOND—ACTION; PROCEDURE

**QUESTION:** In an action brought upon the bond of a county officer, is it necessary to obtain the consent of the Governor before said suit may be brought in the name of the Governor?

*To Honorable Spessard L. Holland, Governor:*

In my opinion it is not necessary to secure your consent if an action will lie, which I express no opinion upon because in the case of *Cassidy vs. Sholtz*, 169 So. 487, the Supreme Court indicated that only certain types of suits could be brought upon this bond; however, they also indicated that where the State was the obligee in the bond, any private suitor could sue thereon for his own use and benefit in the name of the State or in the name of the Governor. I therefore do not see any reason why you should make a specific grant in this instance.

#### TRIALS

March 18, 1943.—043-78.

##### DEPOSITS WITH STATE TREASURER—PROCEDURE WHEN UNCLAIMED

**QUESTION:** What is the procedure to be followed by the Clerk and by the Judge in carrying out the requirements of Section 54.06, Florida Statutes, 1941, which relates to the disposition of Court Registry Funds which have been unclaimed for a period of five years?

*To Honorable J. Edwin Larson, State Treasurer:*

Section 54.04, Florida Statutes, 1941, requires all moneys paid into any court of the State to be forthwith deposited with the State Treasurer, or in a designated depository of funds for the State of Florida.

I understand that the State Treasurer does not designate any depository for such funds except as to funds which the State Treasurer himself deposits in those banks. It would therefore appear that from the standpoint of actual practice, all Court Registry Funds must be deposited with the State Treasurer in the absence of some designated state depository.

Under Section 54.04, Court Registry Funds deposited with you are held by you merely as custodian pending their withdrawal under Section 54.05, Florida Statutes, 1941, on voucher or check signed by the Judge and countersigned by the Clerk of the Court, into the registry of which such funds were originally deposited.

Section 54.06, Florida Statutes, 1941, applies to those funds which have been deposited under Section 54.04, *supra*, which have not been withdrawn under Section 54.05, *supra*, and which have remained so deposited for at least five years unclaimed by the person entitled thereto, where the ownership thereof has either been adjudicated or is not in dispute.

Where such funds have remained deposited and unclaimed for the five-year period, it is the duty of the Judge of the Court into whose registry such funds were originally deposited, to enter an order causing said funds to be deposited with the State Treasurer in the name and to the credit of the State of Florida.

The purpose of this provision, in my opinion, is to take such unclaimed funds from the Court Registry Fund of the State Treasurer and transfer them to the General Revenue Fund of the State of Florida.

### COURT COSTS

April 6, 1944.—044-117.

### SHERIFF—FEES

**QUESTION:** In counties having a population of over 180,000 inhabitants, who should pay the costs of the Sheriff for keeping a person detained under a writ of ne exeat?

*To Honorable Miles W. Lewis, Circuit Judge, Jacksonville, Florida:*

It seems that under Section 58.09, Florida Statutes, 1941, the statute has covered all fees of all Sheriffs in all cases in which the party made the affidavit provided for therein and the certificate of the attorney as specified also accompanies such affidavit. It would seem that in this instance the Sheriff would be only entitled to his actual outlay of money for the items therein specified and I believe that if this affidavit is made, and the certificate given, it is the duty of the Sheriff to execute any ne exeat that may be issued by the Court and do all things required of him to be done by said order. If this affidavit and certificate are not given, then I am of the opinion that it would be necessary to require the person seeking the ne exeat to deposit with the Sheriff a sufficient amount to pay all costs.

While this statute does not seem to afford complete relief, it is the only thing that I have been able to find that is helpful and you will note that it only applies to counties having a population of more than 180,000 inhabitants. I believe that this is a matter that should be called to the attention of the next Legislature and I suggest that at the meeting of the Judges of the Circuit Courts had for the purpose of recommending legislation this be called to their attention so that if the Judges think well of same they can so recommend.

### CHANCERY PROCEDURE LAW

July 11, 1944.—044-196.

### DIVORCE SUITS—PROOF BY DEPOSITION

**QUESTION:** 1. In a divorce instituted by a member of the armed forces serving within the continental limits of the United States, is the actual presence of the petitioner in court required, or may his testimony be taken by deposition?

2. If the testimony may be taken by deposition, is the petitioner required to make an affirmative showing of facts concerning his inability to be present in court?

3. Would the answer to Question 1 be different in the event the petitioner is serving outside the continental limits of the United States?

*To Lieutenant Vincent A. Johnson, Fort Lewis, Washington:*

Actual presence of the plaintiff in court is not required. His testimony may be given by deposition.

Section 63.47, Florida Statutes, 1941, provides that "The testimony of any witness may be taken by deposition de benne esse, either within or without the United States, when the witness resides out of the county in which the cause is pending, or is bound on a voyage to sea, or is about to leave the State of Florida, or to go out of the county in which the cause is pending before the time of trial or final hearing or when he is old or infirm."

Answering your second question, the only affirmative showing concerning his inability to be present in court is the statement in the notice of the reason for taking his deposition.

The same rule applies whether the plaintiff is serving within or without the continental limits of the United States.

It will be observed, from the above mentioned section, that the deposition may be taken before any notary public, or judicial officer or before any officer authorized by the Statutes of the State of Florida to take acknowledgements or proof of execution of deeds. Chapter 21821, Acts of 1943, authorizes any person serving in or with the armed forces of the United States to acknowledge any instrument or execute deeds before any commissioned officer in active service in the armed forces of the United States. A form for such commissioned officer's endorsement on the paper is set out in the statute.

#### PROCEEDINGS SUPPLEMENTAL TO EMINENT DOMAIN

August 26, 1944.—044-254.

##### COMMISSION ON FUNDS DEPOSITED IN COURT

**QUESTION:** What commissions, if any, are allowed Clerks of the Circuit Court on funds deposited in Court in declaration of taking proceedings?

*To Honorable Thomas A. Johnson, Chairman, State Road Department:*

Section 74.06, Florida Statutes, 1941, provides that no sum deposited into Court pursuant to Section 74.05, Florida Statutes, 1941, in declaration of taking proceedings brought pursuant to Chapter 74, Florida Statutes, 1941, shall be charged with commissions or poundage.

It is my opinion, therefore, that as to funds deposited in Court, as provided by said Section 74.05, in support of declaration of taking proceedings, no commissions shall be paid to the Clerk for receiving or paying out such funds so deposited under Section 28.24, Florida Statutes, 1941.

Chapter 21838, Laws of Florida, Acts of 1943, is in harmony with the foregoing opinion.

#### COURTS, GENERALLY

July 12, 1944.—044-199.

##### COUNTY COMMISSIONERS—EXPENSES FOR OFFICE OF COUNTY JUDGE

**QUESTION:** Does Chapter 21681, Laws of Florida, Acts of 1943 (Section 43.03, Florida Statutes, 1941, Volume 1, 1943 Supplement) require the Board of County Commissioners of DeSoto County to expend \$300.00 per year for equipment and expenses for the office of the County Judge?

*To Honorable John H. Treadwell, Jr., Attorney for the Board of County Commissioners, DeSoto County, Arcadia, Florida:*

The words "all Constitutional Courts of Record" in Chapter 21681 appear to me to be ambiguous and of uncertain meaning. Moreover, there are other statutes containing similar language which affect the rights and status of several officials besides the County Judge of your county. There-



fore, I feel that it would be more appropriate that a bill for a declaratory judgment under Chapter 21820, Laws of Florida, Acts of 1943, (Sections 87.01 to 87.13, inclusive, Florida Statutes, 1941, Volume 1, Supplement) be filed for the purpose of securing a judicial interpretation of this language rather than for me to attempt to pass upon the question in an unofficial opinion as requested.

I will be glad to bring the suit in question on request of an official whose interest is such that he would be a proper party plaintiff, or to assist in any other manner to facilitate the obtaining of an early interpretation of the statute by declaratory judgment.

As I view it, the question is whether the term, "Constitutional Courts of Record," refers to (1) Courts of Record in the common law sense (see 14 Am. Jur., pages 250 and 251) or to (2) Civil and Criminal Courts of Record eo nomine specially created by the State Constitution or by the Legislature.

In the common law sense we know that the Supreme Court, Circuit Courts, Civil and Criminal Courts of Record, County Courts and County Judge's Courts are Courts of Record, whereas Justice of the Peace Courts and Municipal Courts are not, yet all of these courts are referred to in the Constitution save Civil Courts of Record.

We know too, that by Constitutional amendment the Escambia County Court of Record was created and that pursuant to the authority of the Constitution the Legislature has by statute created special Criminal and Civil Courts of Record in certain counties.

Therefore, the question as I see it is whether the term, "Constitutional Courts of Record," refers to Courts of Record under the common law definition of such courts, or to Courts of Record eo nomine established specially by the State Constitution or by the Legislature.



## CHAPTER VI

### ELECTORS AND ELECTIONS

#### ELECTION SERVICES

April 26, 1943.—043-105.

#### CREATION OF COUNTY ELECTION BOARD—CONSTITUTIONALITY

**QUESTION:** 1. In the light of Article III, Section 20, is an act creating a County Election Board constitutional when applying only to Hillsborough County by name, although properly advertised under Article III, Section 21, of our State Constitution, as a local or special law?

2. Is an act creating a County Election Board in all counties in the State of Florida having a population of not less than 110,000, and not more than 210,000, according to the last preceding Federal Census, constitutional, even though it may apply only to one county, in the light of *Anderson vs. Board of Public Instruction for Hillsborough County*, 136 So. 334?

3. Would the population bracket act, as referred to in question 2, require previous publication in accordance with Article III, Section 21, of our State Constitution?

*To Honorable J. Rex Farrior, State Attorney, Tampa, Florida:*

1. This question is answered by you in the negative. I do not agree with this conclusion because of the language of Section 24, Article III of the Constitution which, as amended in 1934, provides for a uniform system of county and municipal governments, nevertheless excepts cases "where local or special laws for counties are provided by the Legislature that may be inconsistent therewith."

In the case of *Singleton v. Knott*, 101 Fla. 1077, 133 So. 71, a singular contention was made based on Section 20 of Article III of the Constitution, and the Court sustained the Commissioner's opinion, in which he overruled the contention because of the language of Section 24 of Article III. (See 6th headnote and opinion, page 74 of 133 Southern, also *Waybright v. Duval County*, 142 Fla. 875, 196 So. 430.)

2. The correct answer to this question in the light of the cited case, is: "Yes, if the proposed bill is properly advertised." (See 7th headnote and opinion, pages 338 and 339 of 136 Southern).

3. The correct answer to this question in the light of the cited case, is: "Yes." As the court points out in that decision (second headnote and opinion, page 337) a bill may be introduced and treated as a general bill, yet it may nevertheless be treated by the court as a local or special bill, and as such must be advertised.

March 9, 1943.—043-71.

#### COUNTY COMMISSIONERS—LIST OF ELECTORS; PUBLICATION

**QUESTION:** Should the Board of County Commissioners of a county approve and pay a bill submitted to them, for the publication of the list of registered and qualified electors, at the request of the Supervisor of Registration and without their approval or consent, where there is no item included in the county budget for that purpose?

*To Honorable Bryan Willis, State Auditor:*

It is expressly stated in the request for an opinion that the Supervisor of Registration directed the publication of the list without the approval of the Board of County Commissioners and that there were no funds appropriated in the applicable budget for the payment of such item. We assume the facts to be as stated for the purposes of this opinion.

Chapter 129, Florida Statutes, 1941, requires that each county adopt a budget in accordance with said chapter; and further requires that the budget adopted provide for the necessary and ordinary expenses, as well as the special and extraordinary expenses contemplated, for the fiscal year. This budget is given the force and effect of an appropriation. Where the budgeting of an expense is required, any such expense incurred without the existence of such budget is unauthorized and the contracts in connection therewith void.

The publication of the list of electors does not seem to be an essential part of the election processes, and was evidently intended merely as advice to the registered electors as to who were registered in the voting district. The absence of any voter's name from the list would not defeat his right to vote, if in fact duly registered. The provision seems directory and not mandatory; therefore, no legislative appropriation should be presumed.

As no provision was made in the applicable county budget for the payment of the publication of the list of registered and qualified electors in question, I am of the opinion that the county commissioners are without authority to approve and pay the bill for its publication. If there had been a provision made for the payment of such expense in the applicable budget I am of the further opinion that the Board of County Commissioners might, in their discretion, approve and pay the bill even in case the list was published at the request of the Supervisor of Registration without their approval or consent, but the item not having been budgeted the County Commissioners are without authority to approve it.

February 8, 1944.—044-46.

#### DEPUTIES—APPOINTMENT

**QUESTION:** Is a Sheriff authorized to appoint more than one deputy to serve at a polling place in order to guard against the occurrence of violations of the election laws of this state in the coming primary election, provided that the Sheriff himself pays the compensation of the second deputy?

*To Honorable Berlin A. Sawyer, Sheriff, Monroe County, Key West, Florida:*

The provisions of Section 99.39, Florida Statutes, 1941, require that there shall be in each polling place in each election district a Deputy Sheriff who shall be deputized for such purpose by the Sheriff of the county. Each Deputy Sheriff whose services are provided for and required by said section shall be paid his compensation by the County Commissioners of the county in which such Deputy Sheriff serves. See Section 99.04, Florida Statutes, 1941.

I call your attention to Section 875.44, Florida Statutes, 1941, wherein it is provided:

"The sheriffs of this state shall exercise strict vigilance in the detection of any violations of the primary election law of this state and in apprehending any violators thereof."

It is my opinion that you may appoint a second Deputy Sheriff for service at any polling place in your county, whenever, in your judgment, such action and appointment on your part is necessary in order to provide adequate law enforcement at such polling place.

The election inspectors at each polling place are in charge of the conduct of the election. It is unlawful for any officer to come within the polling place, except for the purpose of casting his ballot, unless he shall have been summoned by a majority of the inspectors.

## BALLOTS

September 1, 1943.—043-228.

### ABSENTEE VOTING—WAR BALLOTS

QUESTION: 1. Should any ballot containing state and local candidates as well as federal candidates be sent out to those in the military service regardless of registration, or should we have two war ballots printed—one containing candidates for federal offices only, to be sent out regardless of registration and the other war ballot containing both federal, state and local offices to be sent out only to those in the military service who are registered voters?

2. In the event that the war ballot containing both federal, state and local candidates should only be sent to those who are registered voters then will you kindly advise if that means in counties requiring reregistration every two years that such persons in the military service obtaining the ballot would be entitled to the same provided he had ever at any time registered in the county, even though he had been prevented from reregistering by reason of his absence in the military service?

*To Honorable R. A. Gray, Secretary of State:*

Sections 301-315, Title 50, U. S. C. A., same being Public Law 712—77th Congress, provides for the absentee voting of persons in the armed forces of the United States and Section 301 thereof provides that such persons may vote for electors for President and Vice-President of the United States, United States Senators and Representatives in Congress, notwithstanding any provision of state law relating to the registration of qualified voters. Section 305 of this law prescribes the form, style and contents of such absentee ballots to be used and also provides that in case the State Legislature of any state shall have authorized it, that such ballot may provide for voting for candidates of state, county and other local offices and with respect to any proposed amendment to the State Constitution or any other proposition or question which is to be submitted to a vote within the state.

Chapter 22014, Laws of Florida, Acts of 1943, provides for absentee voting by registered qualified electors of the State of Florida serving in the armed forces of the United States, on the occurrence of any election hereafter held pursuant to law in this state. Section 3 of Chapter 22014 provides that the Secretary of State of the State of Florida in preparing official war ballots for elections held in this state in accordance with Public Law 712, shall also provide on said ballot for voting for all candidates for state, county and other local offices and any proposed amendments to the Constitution of the State of Florida or any other proposition or question which is to be submitted to a vote in the state. Section 7 of Chapter 22014 provides that the County Canvassing Board shall count and canvass the ballots of those persons not registered only as to the votes cast by them for offices embraced in the Federal Law.

It clearly appears that the Federal Law intended to permit the combining of the absentee war ballots provided therein with similar ballots provided by state law for the voting for state and county offices and other state questions and that the Florida Law expressly provides for such combining of ballots.

I am, therefore, of the opinion that the Secretary of State should prepare only one ballot which shall contain all candidates and questions

to be voted on as set forth in both the state and federal laws, although the ballots of those electors who are not registered according to the Constitution and Laws of the State of Florida shall not be counted by the County Canvassing Board except as to such offices as are included in the Federal Law.

This war ballot is to be furnished an elector in the armed forces upon his having made proper request therefor. The question of whether the elector who is voting a war ballot is registered as required by the laws of this state, should be determined by the canvassing board at the time and in connection with the counting and canvassing of the war ballots, and is not to be determined before the ballot is furnished to the applicant for voting. In this connection, I call your attention to the provisions of Section 98.42, Florida Statutes, 1941. The effect of this section is to render any general or special law requiring reregistration as a prerequisite to the right to vote, inapplicable to a Florida citizen who is a member of the armed forces of the United States, and who was legally registered at the time of his induction.

Chapter 22014 provides that you shall prepare instructions to electors who desire to cast a war ballot. It is my opinion that you should instruct each elector to whom a war ballot is furnished, that under the provisions of Section 98.42, supra, he is exempt from any reregistration requirement if he was a duly registered elector at the time of his induction and that he is, therefore, qualified to vote the complete ballot furnished him for the 1944 primary election. The voter should be further instructed that if he is not a registered elector, he should vote only that part of the ballot which relates to candidates for national offices. It is my thought that such instructions would be of value to the voter in advising him of the extent of his rights as an elector.

The form of application for a war ballot set forth in Section 303, Title 50, U. S. C. A., does not contain a statement of the applicant that he desires the ballot of any particular political party. The inadequacy of the application in this regard, insofar as primary elections are concerned, might result in confusion in the event that there should be a primary election held in Florida in 1944 for each political party. Upon your calling this matter to the attention of the Secretary of the Navy and the Secretary of War, it may be that the form of application for war ballots in primary elections will be corrected in this regard. Should it become necessary for you to do so, you may, under Section 5 of Chapter 22014, prescribe the form of application to be used by one in requesting a war ballot.

July 31, 1944.—044-219.

#### INDEPENDENT CANDIDATES—NAMES ON BALLOTS

QUESTION: 1. May an independent candidate have his name printed upon the general election ballot?

2. May a rubber stamp be used to fill in the name of an independent candidate on the blank line provided upon said ballot?

*To Honorable R. Bruce Meffert, Chairman, Board of County Commissioners,  
Marion County, Ocala, Florida:*

The above questions are answered in the order in which they are stated, as follows:

1. In my opinion there is no means whereby an independent candidate may have his name printed on the general election ballot.

2. It is my opinion that since the election laws of our state do not specifically provide for the filling in of the name of an independent candidate on the general election ballot by rubber stamp, and since our Supreme Court apparently has never ruled upon the point, the use of such means to vote for an independent candidate would be subject to question.



## PARTY ASSESSMENTS

January 3, 1944.—044-1.

## CANDIDATES FOR STATE LEGISLATURE

**QUESTION:** Section 102.27, Florida Statutes, 1941, provides that the party assessment therein authorized to be made shall not exceed two per cent of the annual salary or compensation of the office sought by a candidate. Section 102.31 provides that each candidate for public office must pay a filing fee, the amount of which shall be three per cent of the annual salary or compensation of the office sought by the candidate. In order to determine the amount of filing fee that a candidate for the office of State Representative should pay, as required by Section 2, Chapter 21851, Laws of Florida, Acts of 1943, should the salary of \$6.00 per day paid to a State Legislator, which amounts to the sum of \$360.00 for a regular Legislative Session, be considered as the salary of a member of the Legislature for two years, or for one year?

*To Honorable George G. Crawford, Clerk of the Circuit Court,  
Leon County, Tallahassee:*

Members of the Legislature are paid a salary of \$6.00 per day only for those days when the Legislature is in session. See Section 11.13, Florida Statutes, 1941; Article 3, Section 4, Constitution of Florida. No salary is paid a member of the Legislature during any year within which a session of the Legislature is not held.

The salary paid to a State Representative is the same as that paid to a State Senator. As to candidates for the office of State Senator, who were and are required by law to pay their filing fee to the Secretary of State, it has, since 1933, and no doubt prior thereto, been the Secretary of State's departmental interpretation of the provisions of the above statutes that the salary or compensation paid to a State Senator for his services in attending a regular session of the Legislature was the annual salary or compensation of such office for the year within which the Legislative Session was held and such salary received by such member. Based upon such interpretation, the three per cent filing fee, and the party assessment fee was and is calculated against the sum of \$360.00 to obtain the amount of the qualifying fee.

Although many sessions of the legislature have convened since the effectiveness of this departmental interpretation, no bill has been enacted for the purpose of modifying or revoking the same.

A practical construction of a statute by a governmental department is, when not in conflict with some provision of the Constitution or the plain intent of the Act in question, of great persuasive force.

I am of the opinion that the interpretation as above set forth should be adhered to and followed by you, as Clerk of the Circuit Court, in determining the amount of filing fee to be paid to you by a candidate for the office of State Representative.

January 5, 1944.—044-5.

## DISPOSITION BY SECRETARY OF STATE

**QUESTION:** Under Chapter 21851, Acts of 1943, all candidates for the State Senate are now required to qualify with the Secretary of State. Should the Secretary of State collect from all candidates for the State Senate, as the party committee assessment, the amount levied by the State Executive Committee and remit the same to the said Committee, regardless of whether the Senatorial District involved comprises only one county or more than one county?



*To Honorable R. A. Gray, Secretary of State:*

The authority of an executive committee of a political party to levy an assessment against a candidate for party nomination for office in a primary election is found in Section 102.27, Florida Statutes, 1941, wherein it is in part provided that the "county executive committee shall have exclusive power to levy assessments upon candidates to be voted for only in a single county. . ."

It follows that, as to candidates for the State Senate who are to be voted for only in one county, the party assessment fee to be collected from such candidates must be the fee levied by the Executive Committee of such county, and, when collected, such fees must be remitted to such Committee. As to candidates for the State Senate who are to be voted for in more than one county, the State Executive Committee has the exclusive power to levy the party assessment, and you should collect from such candidates, as the party committee assessment, the amount levied by the State Executive Committee, and remit the sum collected to such Committee.

### QUALIFICATIONS

August 29, 1944.—044-256.

#### ARMED FORCES—SERVICE ABROAD AS PART OF RESIDENCE REQUIREMENT

QUESTION: Are members of the armed forces stationed at some base within the State of Florida prior to being sent abroad, and who were returned to this state and honorably discharged, authorized to compute the term of service abroad as a part of the residence requirement which is a prerequisite to registering?

*To Honorable R. A. Gray, Secretary of State:*

There appears to be a missing element in your inquiry, which is whether a member of the armed forces when sent into Florida from another state, had any intention to shift his residence from the state in which he previously resided to the State of Florida, or whether the intention or the desire to make Florida his home occurred at any time prior to his discharge.

It has been held by our Supreme Court that a soldier sent to Florida from another state, in obedience to an order of his superiors and in line of duty, without any intention to shift his residence, does not change his domicile from such other state, it being necessary in order to effect a change of domicile that there be removal and intent. If the soldier is ordered into Florida from some other state and intends to become domiciled in Florida and registers as a qualified voter in Florida, his domicile is Florida.

From the foregoing I would state that it is my opinion, in line with the decision of the Supreme Court, that if the soldier, when ordered into Florida, has a bona fide intention to make Florida his actual permanent place of residence, he will be entitled to register and vote and that if ordered by the military authorities to go elsewhere, the time spent abroad may be calculated in computing the required period of residence, provided that his intention to continue his residence in Florida exists throughout the period of his absence and until he presents himself for registration.

November 23, 1944.—044-328.

#### DECEASED SHERIFF—SUCCESSOR

QUESTION: Where an incumbent Sheriff, elected to succeed himself, dies between the general election and the beginning of his new term, should a special election be held to fill the office for such new term?

*To Honorable D. P. McKenzie, Representative-elect for Levy County, Chiefland, Florida:*

The only statutory provision we have, bearing upon this question, is found in Section 98.08, Florida Statutes, 1941, as follows:

"(1) Where there has been no choice of any officer who should have been elected at a general election."

There seems to be nothing in the Constitution of Florida which fixes a rule in conflict with the statutory provision mentioned. On the contrary, Section 9, Article XVIII of the Constitution provides, among other things, for the filling, in general elections, of elective offices that have become vacant, and also this seems to be contemplated by Sections 6 and 7, Article XVIII (as recently amended) with respect to appointments by the Governor to fill vacancies. Also see *State v. Bird*, 163 So. 248, from which the following is quoted:

"Vacancies in the elective offices, except in the offices of Governor and members of the Legislature under section 6 of article 3, are filled by executive appointment until 'the election and qualification of successors at the ensuing general election,' (section 6, art. 18) or for the unexpired term if it comes before the next general election (section 7, art. 4)."

Since the deceased Sheriff was the choice of the electors, at the last general election, to succeed himself as aforesaid, it would seem the condition set forth in the quoted law prerequisite to the holding of a special election does not apply in this case. Hence, it is my opinion that such a special election cannot be held and that the vacancy will have to be filled by executive appointment.

May 29, 1944.—044-156.

#### EXTRAORDINARY SESSION—VACANCIES IN THE LEGISLATURE

QUESTION: 1. Should opportunity be given to fill legislative vacancies before calling an extra session?

2. What is the procedure for calling an extraordinary session?

3. What is the procedure for the filling of vacancies in the two bodies of the Legislature in the event of a call for a special session prior to the general election, including all time factors involved?

4. What notice must be given between the actual issuance of the proclamation and the convening of the session?

*To Honorable Spessard L. Holland, Governor:*

1. Section 98.08 (2), Florida Statutes, 1941, requires special elections to be held when a vacancy shall occur in the office of State Senator or Member of the House if the vacancy exists after a session of the Legislature and before a general election, and a session of the Legislature is to be held before such general election.

The term of office of a Legislator in this State expires when his successor is elected unless that successor is unable to qualify when the session is called; therefore, after the general elections in November the new Legislators for any session then called or held will be those elected then plus the holdovers. Should you desire to avoid these special elections, a call for a special session made subsequent to the general election in November would accomplish same.

2. Article III, Section 2, Constitution of Florida. The Governor may convene the Legislature in extraordinary session by his proclamation.

Article IV, Section 8. In his proclamation the Governor is required to state the purpose for which the session should be convened and the Legis-

lature when organized under such call cannot transact any legislative business other than that for which it is specially convened or such other legislative business as the Governor may call to its attention while in session, unless its determination to do otherwise is supported by a two-thirds vote of each house.

For your information I attach hereto copies of proclamations issued by four of your predecessors calling extraordinary sessions of the Legislature, but in my opinion these proclamations—excepting one—are in terms too broad in stating the purpose of the session, if such purpose is in fact limited to specific legislative conceptions.

3. Section 98.10, Florida Statutes, 1941. The law requires the Governor to make an order calling a special election when same is necessary, and in this order to declare on what day the election shall be held. The Governor is required to deliver this order to the Secretary of State, who is thereupon required to publish notice of the election to be held thereunder in one or more newspapers published weekly at the State Capital, not less than 15 days nor more than 40 days prior to the election. The Secretary of State's notice shall contain description of the vacancy or vacancies to be filled, and the county or counties in which the elections are to be held. The Secretary of State is also required to deliver to the Sheriff of each county in which such special elections are to be held a notice of the time of election, and the offices to be filled by the voters, and the Sheriff is required to cause a copy of such notice to be published weekly in some newspaper printed in his county, if there be such newspaper. If there is no such paper, the Sheriff is required to cause at least five copies of such notice to be posted in the most public and conspicuous places in the county. Such notice is required to be given for the same period of time as the notice published at the State Capital.

Section 98.47, Florida Statutes, 1941. Upon the publication or posting of the notice of election in the county where the same is to be held, the Board of County Commissioners is required to hold such meeting or meetings as may be necessary for the purpose of arranging for such special elections, the appointment of clerks and managers of the several voting precincts in their respective counties and the doing of all things necessary to the conduct of such election, which is required in all respects to conform to the laws governing general elections, except where special provision to the contrary exists, and except in cases of requirements of law governing general elections that cannot be applicable by reason of the length of time elapsing between the calling and holding of such special election.

The actual date of election must be made for a time subsequent to the completion of the published notice, which is not less than 15 nor more than 40 days from the beginning of the publication.

4. Where members of the Legislature have to be elected before the session is to be held, ample time between the proclamation and the convening must be given for such complete election process. Otherwise no particular time or notice is required between the issuance of the proclamation and the convening of the session.

The proclamation for the session must fix the time when the extra session is to convene. The proclamation does not, in its terms, have to "convene" the Legislature in extra session. It only proclaims the call for same and the time of convening.

It is respectfully called to your attention that all of the foregoing has to do with elections and not primaries and that each party has a right to offer its nominee for such election, and that no consideration has been given in this memorandum of the procedure necessary in obtaining the party nominees for the election. If you postpone any proposed call for an extraordinary session until after the general election, all matters involving nominees and primaries will be disposed of by the fact that your call then can be to the newly elected electors; on the other hand, if you are desirous

of making your call for the extraordinary session before the general election, we will of necessity have to furnish you a more complete memorandum covering the procedure for nominations. However, I am of the opinion that since both political parties in this state have named their nominees for the general election in November, 1944, procedure may be prescribed for those being the nominees for any special election which you might call before such general election to fill the vacancies under consideration.

If you decide to call the special session prior to the November general election, I will furnish you with such further advice as you may desire concerning vetoed bills of the last regular session, and such other matters having to do with the required submissions to such special session.

January 24, 1944.—044-32.

#### MEMBERS OF ARMED FORCES IN FLORIDA

**QUESTION:** Does a member of the armed forces of the United States who at the time of his induction was a legal resident of some state other than Florida and who has been encamped in the State of Florida for more than one year and the County of Polk for more than six months, with the intent and purpose during such time that Florida is and shall continue to be his home and permanent place of abode, possess the legal requirements of a qualified elector of this state?

*To Honorable Hugh E. Carlton, Supervisor of Registration,  
Polk County, Bartow, Florida:*

In consideration of this question, I call your attention to Section 98.01, Florida Statutes, 1941, wherein it is in part provided:

"Every person of the age of twenty-one years and upwards, who shall at the time of registration be a citizen of the United States, and shall have resided and had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months, shall, if otherwise qualified, according to law in such county, be deemed a qualified elector at all elections under the constitution."

A member of the military forces of the United States, who has been sent into Florida from another State in the line of duty and in obedience to the orders of his superior officers, and whose stay in this State is without any intention to change his residence, does not by his stay in Florida bring about a change of his legal domicile.

A citizen of another State, who is a member of the armed forces of the United States, may become a citizen of Florida by removing to and residing in this state with a fixed purpose and intention of making this state his permanent home. In order to meet one of the qualifications of an elector, such person must have, with such purpose and intent, resided in the State of Florida for one year and for six months in the county where registration as an elector is sought.

It is, of course, true that a member of the armed forces of this nation encamped in Florida came to this State in obedience to a military order. However, if such person resides in this state for the time and with the intent and purpose required by law, his desire to become a resident and qualified elector of this state will not be frustrated by the fact that he came to Florida in the line of military duty and at the direction of a superior officer. See *Gipson v. Gipson*, 10 So. 2d 82, and *Mills v. Mills*, 15 So. 2d 763.

It is therefore my opinion that any person, whether he be a civilian or a member of the military forces of this nation, who possesses the qualifications enumerated in Section 98.01, *supra*, and who possesses the further qualifications necessary for membership in the political party of his choice, is a qualified elector and is entitled to registration as an elector and as a member of such political party.



March 16, 1944.—044-85.

### POLITICAL PARTIES—QUALIFICATIONS OF MEMBERS

**QUESTION:** Should a Supervisor of Registration permit members of the colored race to register as members of a political party of this state which limits its membership to the white race?

*To Mrs. Easter L. Gates, Supervisor of Registration,  
Broward County, Ft. Lauderdale, Florida:*

Political parties in Florida do not perform a governmental function, neither do they, or either of them, constitute a governmental agency. Such parties came into existence, not as the children of statute, but as a result of the exercise of the free will and choice of those citizens who compose them. Each party is a voluntary association formed by citizens for political purposes. The authority of determining who shall and who shall not become a member thereof is inherent in the party.

The Democratic Party in Florida, speaking through its State Democratic Executive Committee, has provided that only white persons may become members of such Party. See Resolution No. 2, adopted January 17, A.D. 1944. This determination of qualifications for party membership is a valid exercise of the inherent power of the Party. See *Grover vs. Townsend*, 295 U.S. 45, 79 L. ed 1292, 97 A.L.R. 680.

The Democratic Party in this state having determined that only white persons may become members thereof, you are without authority to register as a member thereof any other person.

March 17, 1944.—044-87.

### REGISTERING; VOTING—TYNDALL FIELD

**QUESTION:** 1. May registration books be placed on a part of Tyndall Field, said part formerly having been certain precincts of the county, over which army reservation Florida has ceded jurisdiction?

2. Are the votes cast within the limits of the reservation valid?

*To Honorable Mercer Spear, County Attorney, Bay County,  
Panama City, Florida:*

The United States, in condemning certain lands in Bay County, took over territory which included three former county precincts.

Exclusive jurisdiction over the land taken, which later became a flight training school known as Tyndall Field, was ceded by the State of Florida to the Federal government by deed of cession dated January 7, 1943. A state's legislation is not effective concerning matters beyond her jurisdiction and within the territory subject only to control by the United States government. *Standard Oil Co. v. California*, 291 U.S. 242-245, 78 L.ed. 775.

In answer to your questions, accordingly, it is my view that the county has no legal right to enter the ceded territory and place thereon registration books or attempt to hold an election.

March 10, 1944.—044-74.

### REGISTRATION—ELECTOR MUST PERSONALLY APPEAR

**QUESTION:** May a person in military service register as an elector through a power of attorney?

*To Mrs. T. F. Ellzey, Supervisor of Registration,  
St. Johns County, St. Augustine, Florida:*

In my opinion a person with power of attorney could not legally register the name of another as a qualified elector. Section 102.21, Florida



Statutes, 1941, relates to the registration of electors who desire to vote in primary elections. This section in part provides:

"Every elector may be registered without charge by **personally appearing** in office of the said supervisor of registration and, after being duly sworn, stating the following facts, which the supervisor of registration shall appropriately enter in the general county registry. . ."

It is clear from the provisions above quoted that the law contemplates and requires that the elector who desires registration shall personally appear before the registering authority.

October 20, 1943.—043-274.

#### REREGISTRATION—SERVICEMEN

**QUESTION:** The 1943 session of the Florida Legislature enacted Chapter 21904, a local law applicable to Suwannee County, the provisions of which require reregistration of all qualified electors of Suwannee County as a prerequisite for voting in any general, special or primary election to be held after February 1, 1944.

What is the effect of this chapter upon those citizens of Suwannee County who are now entering, or who have already entered the military service of the United States, and are, therefore, not in a position to re-register?

*To Honorable John Q. Boatright, Supervisor of Registration,  
Suwannee County, Live Oak, Florida:*

In this connection I call your attention to the provisions of Chapter 22000, Laws of Florida, Acts of 1943. By the enactment of this chapter, the Legislature re-enacted Florida Statutes, 1941. Section 98.42, Florida Statutes, 1941, in part provides:

"All persons inducted into the military service of the United States and remaining in such service during the period when the registration books of any county in this state are open for the re-registration of electors shall be exempt from the operation of any law, general or local, requiring reregistration as a prerequisite to the right to vote in any primary, general or special election, provided such person has been duly registered as an elector during any previous registration period and his name has not been removed from the registration lists according to law."

In construing and applying a statute, the purpose designed by the Legislature to be accomplished and the means embraced for the accomplishment of such purpose must be considered to ascertain the true legislative intent. In the provisions of Section 98.42, *supra*, is to be found positive evidence of the legislative purpose and the intent that the duly registered and qualified electors of this state who are inducted into the armed forces of this nation shall not be deprived of their right to vote because of any general or local law relating to reregistration. The purpose to be accomplished by this act is not out of harmony with the legislative purpose and intent embraced in Chapter 21904, wherein reregistration is provided for. These two acts should be read and considered together. When this is done, it is clear that Chapter 21904 requires reregistration of all qualified voters of Suwannee County, who are not members of the armed forces of the United States, as a prerequisite for voting in any election to be held after February 1, 1944.

It is my opinion that those citizens of Suwannee County who, at the time of their induction into the military services of the United States, are duly registered as electors, are not affected by the provisions of Chapter 21904, *supra*, and no reregistration may be required of them while they are engaged in such service, as a prerequisite to their right to vote.

May 16, 1944.—044-149.

#### TRANSFER OR REREGISTRATION—FEES

QUESTION: 1. Are deputy registration officers and precinct registration officers entitled to compensation for reregistering an elector?

2. Are such officers entitled to compensation for transferring from one election precinct to another the registration of an elector?

*To Miss Ella Lee Lloyd, Supervisor of Registration,  
Jefferson County, Monticello, Florida:*

It is my opinion that when reregistration is required by law, the deputy registration officers and precinct registration officers may lawfully be paid a fee for reregistering an elector. The amount of such fee is to be fixed by the Board of County Commissioners but must not exceed the sum of twenty-five cents for each registration. See Section 102.16, Florida Statutes, 1941. It is my opinion that deputy registration officers and precinct registration officers may also be paid a fee for transferring an elector's registration from one precinct to another within a county, such fee to be fixed by the Board of County Commissioners under the provisions and subject to the limitations of said Section 102.16.

If there exists a special act concerning this subject and applicable to your county, then the rights of the deputy registration officers and precinct registration officers would be governed as prescribed in such special act.

#### SUPERVISORS OF REGISTRATION

June 23, 1943.—043-143.

#### DUTIES; VOTING MACHINES—WRITE-IN VOTES

QUESTION: What are the duties of the Supervisor of Registration in making provisions relative to ballots and voting machines for casting votes for persons whose names do not appear upon the official ballot in counties where voting machines are used?

*To Honorable Fleming H. Bowden, Supervisor of Registration,  
Duval County, Jacksonville, Florida:*

Section 99.10, Florida Statutes, 1941, provides that the Board of County Commissioners shall have ballots printed with blank lines under each office to be voted on. Chapter 100, Florida Statutes, 1941, relates to voting machines and Section 100.01 thereof defines "irregular ballot" as a vote cast by or on a special device for a person whose name does not appear on the ballot. Section 100.07 provides that official ballots shall be in the order and arrangement now provided by law and Section 100.13 provides that the official ballots for use upon voting machines shall be prepared and furnished in the same manner, at the same time and be delivered to the same officials as now provided by law.

I am unable to find any law prescribing duties of the Supervisor of Registration relative to preparing ballots for voting machines. However, I call your attention to Chapter 22018, Acts of 1943, which makes the Supervisor of Registration the custodian of voting machines.

I am, therefore, of the opinion that the duty of preparing official ballots in counties where voting machines are used is reposed in the Board of County Commissioners and not in the Supervisor of Registration.

January 20, 1944.—044-29.

#### OFFICIAL SEAL—CERTIFICATES OF REGISTRATION

**QUESTION:** Do the provisions of Section 3, Chapter 21762, Laws of Florida, Acts of 1943, contemplate that an impression of the official seal of the Supervisor of Registration shall be attached to each certificate of registration?

*To Honorable Hugh E. Carlton, Supervisor of Registration,  
Polk County, Bartow, Florida:*

Section 3 of the Chapter referred to provides:

"The Supervisor of Registration in each county of the State of Florida is empowered and directed to attach an impression of said seal to or upon all official documents and certificates executed over his signature."

It is my opinion that a certificate of registration executed over the signature of the Supervisor of Registration is an official certificate within the meaning of said section, and it is appropriate that an impression of the seal of such officer be attached thereto. It is my opinion, however, that the provisions of Section 3 are directory only, and the absence of an impression of such seal from a certificate of registration would not invalidate the same, or in any way affect the right of a duly qualified elector therein named and described to exercise his right to vote.

#### HOLDING ELECTIONS

September 26, 1944.—044-290.

#### BALLOTS—MARKING

**QUESTION:** 1. If a voter should mark an X in the circle indicating his intention to vote a straight party ticket and should then mark an X before the name of an individual candidate in another party column, or,

2. If the individual voter should mark an X in the circle indicating his intention to vote a straight party ticket and should also write in a name in the blank space under some office and properly mark such name with an X before it, should the ballot:

(a) Be thrown out in its entirety, or,

(b) Be thrown out only as to the conflict in the particular office where the individual candidate was voted for and allowing the remainder of the ballot to stand?

*To Honorable R. A. Gray, Secretary of State:*

Section 99.19, Florida Statutes, 1941 (subject to Section 99.57), provides the form of the general election ballot, and among certain matters required to be printed thereon is the following: "Make a cross mark (X) before the name of the candidate of your choice."

Section 99.57, Florida Statutes, 1941, provides a method of voting a straight party ticket and provides in connection therewith the form of ballot. Paragraph (2) of said section provides that any person desiring to vote a straight party ticket may make a cross in the circle under the appropriate party designation, and this shall constitute a vote for all nominees of that party listed on the ballot; provided that any voter not desiring to avail himself of this method of voting may vote for the candidate or candidates of his choice by making a cross by the name of that individual candidate, as now provided by law.

Section 99.36, Florida Statutes, 1941, provides that if the elector marks more names than there are persons to be elected to an office, or if for

any reason it is impossible to determine the elector's choice for any office to be filled, his ballot shall not be counted for such office; but this shall not vitiate the ballot, insofar as properly marked, and nothing therein shall be construed to prevent any elector from voting for any qualified person other than those whose names are printed on the ballot.

A study of the factual situations and inquiries with respect thereto, set forth above, indicates that considerable conflict of authority exists in other states concerning these questions. The difference found in such decisions seems to turn on the wording of election statutes in various states. So far our Supreme Court has not had occasion to pass upon either of the questions above, it being recognized, of course, that the above Section 99.57 is recent legislation.

One who votes a straight party ticket, as provided in said Section 99.57, by so doing votes for all nominees of that particular party listed on the ballot, and in my opinion, under such circumstances such nominees are voted for as effectually as though a cross mark were placed before the name of each of such nominees. Thus in each of the factual situations contemplated by questions 1 and 2, there is presented a voting for two persons for the same office. By the express wording of above Section 99.36, if the elector marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office.

In view of the foregoing, it is, therefore, my opinion that the above questions are properly answered as follows:

As to the factual situations set forth in questions 1 and 2 and (a) above, the answer is in the negative, and question (b) above is answered in the affirmative.

August 24, 1944.—044-250.

#### BOARD OF COUNTY COMMISSIONERS—SEMINOLE COUNTY

**QUESTION:** Given the factual situation of a peremptory writ of mandamus having been issued by a Circuit Court requiring members of a Board of County Commissioners to print on the general election ballots the name of the unopposed Democratic candidate for County Prosecuting Attorney, who failed to file a third campaign expense statement as required by Section 102.57, Florida Statutes, 1941, and such County Commissioners feeling that because of the importance of the matter it may be their duty to appeal from order in such proceedings:

1. If they comply with the peremptory writ and print this candidate's name on the general election ballots will they be protected from criminal liability under Section 102.64, Florida Statutes, 1941?

2. Will they be justified in going to the expense of an appeal?

3. There being only questions of law involved and no question of fact decided by the Circuit Court is it necessary to present a motion for new trial or rehearing before suing out a writ of error?

4. Will the writ of error operate as a supersedeas under Section 59.13, Florida Statutes, 1941, immediately upon the filing of the notice of appeal with the Circuit Court and without bond? (Section 59.14).

5. Is there any short cut to obtain a decision from the Supreme Court in a mandamus proceeding presenting only questions of law and involving a question of state-wide application?



*To Mr. Lloyd F. Boyle, Attorney at Law, Sanford, Florida:*

In my opinion, the above questions are properly answered in the order in which they are set forth as follows:

1. The members of the Board, if they see fit to comply with the peremptory writ, will be protected by virtue of such writ from criminal liability under Section 102.64, Florida Statutes, 1941.

2. It is assumed that this question does not solicit my opinion as to the merits of this case, but has to do with whether or not the expense of an appeal will be a legitimate charge payable by the county if the appeal is taken. It is my opinion the cost thereof would be properly chargeable to the county.

3. Under the stated circumstances, it would appear that no motion for a new trial or rehearing is necessary or prerequisite to an appeal from the final order of the trial court in the cause.

4. In connection with this question, I am assuming that you used the term "writ of error" for "appeal" (see Supreme Court Rule No. 2). It appears to me that the question of supersedeas, in the event appeal is taken, is governed by Supreme Court Rule No. 35 (for authority for this rule, see Section 25.03, Florida Statutes, 1941) and by Chapter 22307, Acts of 1943. From this rule and provision of law, I take it the trial court has the authority to fix the conditions of supersedeas order.

5. I know of no "short cut" to obtaining a decision on appeal. It is recognized that the Supreme Court disposes of cases of this type very quickly when the appeals have been perfected.

September 2, 1944.—044-259.

#### GENERAL ELECTION BALLOT

**QUESTION:** What arrangements of names of candidates on the general election ballot will meet the requirements of Section 99.57, Florida Statutes, 1941?

*To Honorable R. A. Gray, Secretary of State:*

Section 99.57 provides in effect that the officials who prepare such ballots shall arrange names of all candidates in perpendicular columns on the ballot, the candidates of each party being in a separate column, and the candidates of the party receiving the largest number of votes in the last preceding general election shall be placed in the first column; that above each column or list of candidates appearing in the ballot shall be printed in large plain letters the name of the political party by which candidates in such column or list were nominated, together with a circle not less than three-fourths of an inch in diameter and above such circle shall be printed the following words in plain letters: "To vote a straight party ticket make a cross (X) within this circle."

You have enclosed in your letter a sample copy of the form of the ballot which you sent county officials to be followed in the preparation of the ballots. In this form you have the Democratic candidates in a single column at the left-hand side of the ballot, and in the next column Republican candidates.

You also have enclosed a form of official ballot prepared by the officials of one of our counties. In this ballot there are two separate contiguous lists of Democratic candidates on the left-hand side of the ballot and above these two contiguous lists are the words and the circle for voting prescribed by Section 99.57. Immediately to the right of the two adjacent lists of Democratic candidates and separated therefrom by very heavy black perpendicular lines is a column in which appear the Republican



nominees headed by the appropriate wording and the circle required by Section 99.57.

In my opinion the last-mentioned form of ballot is permissible under our statutes. While Section 99.57 uses the word "column" there is nothing in the statute considered as a whole which indicates a legislative intent to prohibit use of more than one column for listing the candidates for each political party.

Section 1.01, Florida Statutes, 1941, Subparagraph (1) provides that in construing a statute in each and every word, phrase or part thereof, where the context will permit, the singular includes the plural, and vice versa. Furthermore, in construing Section 99.57, it is to be given a practical meaning and effect. *Ketchum vs. Commonwealth (Ky)* 276 S. W. 139.

In view of the foregoing, it is, therefore, my opinion that the use of the word "column" in said Section 99.57 is not to be construed necessarily as one column, but that there may be more than one column of names of candidates of any political party, provided that the lists of the names of candidates shall be headed with the words and circle prescribed by said Section 99.57; that the lists of the names of the candidates of the several parties be separated by distinctive perpendicular lines or divisions so as not to mislead; and that the candidates of the party receiving the largest number of votes at the last preceding general election shall be placed on the left-hand side of the ballot.

June 19, 1944.—044-177.

#### PLACING CANDIDATES' NAMES ON BALLOTS

**QUESTION:** How may the names of nominees of political parties and of other groups, as candidates for elective office, be placed upon the general election ballots in this state?

*To Honorable R. A. Gray, Secretary of State:*

Only those candidates of political parties nominated in the primaries or by appropriate executive committee shall be printed on the general election ballot (Section 99.10, Florida Statutes, 1941). A political party is one which at any time within four years next preceding a primary election may have registered as members thereof more than five per cent of the total registered electors of the State of Florida (Section 102.02).

Since the candidates of all political parties are required to be nominated in the general primaries (Section 102.05), the right of nomination by appropriate executive committees is limited. Section 102.48 provides for nomination by the proper executive committee in the event no candidate for any particular office receives a majority of the votes cast in the primary. Section 102.48 provides further that nomination by the appropriate executive committee is permitted in the event of vacancy in nomination or office which has occurred between the general primaries and the general election and then, as to a state officer, only if it occurs less than forty-five days prior to the general election, and as to a county officer, if it occurs less than thirty days before such election, otherwise such vacancy in nomination or office must be filled by special primary as provided in said Section 102.48. A "vacancy in nomination" is to be distinguished from a failure to nominate; and where there has been no nomination in the general primaries there is no authorization for a party executive committee to make an original nomination. *State ex rel Chamberlain v. Tyler, et al.*, 130 So. 721.

The foregoing statements are subject to the provisions of Chapter 22039, Acts of 1943, which chapter provides, among other things, that the State Executive Committee of any minority party may provide by resolution for the method of nomination of Presidential Electors; and a "minority political party" is defined as one which for two consecutive presidential

elections fails to elect a majority of the electors of President and Vice President of the United States and Governor of Florida.

On the basis of the foregoing, it appears that only the candidates of political parties selected as above set forth are entitled to have their names printed on the general election ballot.

### VOTING MACHINES

April 8, 1944.—044-120.

#### CUSTODIANS

**QUESTION:** Are the authorities in charge of elections the lawful custodians of voting machines, under the provisions of Sections 100.05 and 100.10, Florida Statutes, 1941, or is the Supervisor of Registration the lawful custodian of such machines, under the provisions of Section 3A of Chapter 22018, Laws of Florida, Acts of 1943, the same being Section 100.42 of the 1943 Supplement to Volume 1, Florida Statutes, 1941?

*To Honorable R. A. Gray, Secretary of State:*

The provisions of Section 100.42, the last legislative expression upon the subject, determine the question. It is therein provided:

"The supervisor of registration shall be custodian of voting machines in each county using same, unless otherwise specifically provided by law. Such custodian shall have authority to appoint such assistants or deputies as in his opinion shall be necessary to properly and efficiently prepare and supervise machines prior to and during elections. . . ."

It is my opinion that, except in those counties for which a special legislative act may specifically provide to the contrary, the Supervisor of Registration is the lawful custodian of the voting machines in each county using the same.

### ABSENT VOTERS

April 26, 1944.—044-135.

#### BALLOTS—ABSENCE OF AFFIDAVIT

**QUESTION:** May the County Canvassing Board count a war ballot which is not accompanied by the required affidavit?

*To Honorable J. M. Hearn, County Judge, Suwannee County, Live Oak, Florida:*

If the envelope does not contain the voter's affidavit, as required by Sections 306 and 308, Chapter 14, Title 50, U.S.C.A., then the ballot contained in such envelope may not be canvassed. This is true because, absent the required affidavit, there is no way whereby the canvassing board may determine whether the ballot was cast by a citizen of the United States and of the State of Florida.

### PRIMARY ELECTIONS

March 3, 1944.—044-71.

#### BALLOTS—CANDIDATES; DEMOCRATIC NATIONAL CONVENTION

**QUESTION:** May the candidates for the office of Delegate to the Democratic National Convention be grouped on the ballot so as to show whether such delegates are for or against Roosevelt for President, or non-committal, and to have these groups designated in a way that voters might know the views of the candidates on this question?

*To Honorable R. A. Gray, Secretary of State:*

The law relating to the manner and form in which ballots shall be prepared for voting in primary elections is set forth in the provisions of Sections 102.38 and 102.39, Florida Statutes, 1941. It is therein provided that the names of all candidates for any office shall be printed upon the ballot in alphabetical order according to surnames. There exists no authority in the law for the grouping of names for candidates for delegate to the Democratic National Convention in order to indicate with reference to each such group whether the candidates named therein are in favor of nominating Roosevelt or any other person as the Democratic Nominee for President of the United States. The names of all candidates for delegate to the Democratic National Convention are required by law to be printed in alphabetical order on the ballot.

April 8, 1944.—044-119.

#### CANDIDATE—REFUNDING FEE

**QUESTION:** Where a candidate for office, because of physical disability, withdraws from the race prior to the printing of the ballots, is he entitled to a refund of the qualification fees paid by him and should his name be omitted from the ballot?

*To Honorable Hiram Faver, Clerk of the Circuit Court,  
St. Johns County, St. Augustine, Florida:*

It is my opinion that you may, under the circumstances stated, refund to said person the qualification fees paid by him, and omit his name from the ballot.

September 1, 1943.—043-232.

#### CANDIDATES—FILING OF OATH AND PAYMENT OF FEE

**QUESTION:** Must candidates for the office of Judge of the Criminal Court of Record and for County Solicitor file their statutory oath, and pay their filing fee to the Clerk of the Circuit Court, as provided for by Section 102.33, Florida Statutes, 1941, or must such candidate file said oath with and pay said fee to the Secretary of State, as provided for by Section 102.67, Florida Statutes, 1941, (Chapter 20850, Acts of 1941), as amended by Chapter 21702, Acts of 1943?

*To Honorable John R. Himes, Judge, Criminal Court of Record,  
Tampa, Florida:*

Section 102.67, as amended by Chapter 21702, provides that candidates for nominations for appointments or election to the offices of Judge of the Criminal Court of Record, and Judge of the Court of Record in and for Escambia County, and County Solicitor for any county, in a primary election "shall be required to file their sworn statement and pay their filing fee to the Secretary of State not later than the 1st day of February prior to the First Primary Election, and to pay or file receipt with the Secretary of State in like manner as other candidates for their party committee assessment, if any has been levied, not later than March 31st following. . . ." This section represents the latest legislative expression upon the subject, and in my opinion, the provisions thereof should be complied with by all candidates for those offices therein mentioned.

December 13, 1943.—043-326.

#### CANDIDATES IN ARMED FORCES—PROCEDURE

**QUESTION:** Where a candidate for public office is in the armed forces on foreign service is it possible for anyone other than the candidate himself to make oath to the statements that such candidate is required to file during his campaign in our Democratic Primary?

*To Honorable Van C. Kussrow, Acting County Tax Assessor, Miami, Florida:*

In reply I wish to advise that I have carefully examined the statute and all of the cases that have been decided by our Supreme Court construing the same and I am of the opinion that since you are going to handle all campaign matters for such a candidate and that you will be the only one who has knowledge of the matters required by Sections 102.57 and 102.59, Florida Statutes, 1941, it would be proper for you to act under your power of attorney with regard to the execution of the various statements that a candidate is required to file. However, since we do not have any Supreme Court decisions directly in point on this matter, I call your attention to Chapter 21820, Laws of Florida, Acts of 1943, which provides for a declaratory judgment in certain instances and suggest that you might take the matter up directly with your attorney and it might be possible to file a suit under this act and secure a declaratory judgment, which, of course, would definitely settle the matter.

March 31, 1944.—044-111.

#### CANDIDATES' OATHS

**QUESTION:** Where a candidate for nomination to an office, in filing the oath required by Section 102.29, Florida Statutes, 1941, fails to include in such oath a portion of the information required by said statute, and the Secretary of State, in receiving and filing such oath, fails to notice such omission but later discovers it, should he cancel the filing of such oath and return the fee paid; or should he await court action by some interested party?

*To Honorable R. A. Gray, Secretary of State:*

A candidate for Republican nomination to the office of State Senator filed an oath in the Secretary of State's office, some time prior to February 1, 1944, paid the qualification fee required and was listed as a candidate for Republican nomination. In preparing the oath to be filed, the said candidate drew a line through certain language included in the printed form of oath, thus indicating his intention to eliminate such language from the sworn statement. The language through which the line was drawn is as follows:

"that he did not vote for any nominee of any other party, national, state or county, at the last general election; that he did not register as a member of any other political party during the two years immediately last past,"

Section 102.29, Florida Statutes, 1941, in part provides that:

"Every candidate for nomination to any office herein provided for shall be required to take and sign and subscribe to an oath or affirmation in writing. . . ."

and it is provided that such oath shall contain, in substance, the language which the candidate concerning whom you write eliminated from the sworn statement that he signed and filed with you. By eliminating such language from the statement, the candidate materially altered the same, and he has, therefore, failed to file a sworn statement as required by law.



The duties of the Secretary of State concerning election matters are ministerial. When a candidate, within the time provided by law, submits to you his sworn statement and such statement contains the matters set forth in Section 102.29, you have the duty to receive and file the same. However, when a candidate eliminates from his sworn statement any matter that is required by said section to be included therein, you are without authority to accept such sworn statement in lieu of the one required by law.

It is my opinion that it is your duty to cancel the filing of the affidavit in question, and return to the candidate the fee paid.

January 18, 1944.—044-21.

#### CANDIDATES—QUALIFICATION FEES

**QUESTION:** Should candidates for county offices in Hardee County pay their qualification fees to the Clerk of the Circuit Court, or to the Clerk and Auditor of the Board of County Commissioners, whose employment is authorized and whose duties are determined under the provisions of Chapter 22309, Special Acts of 1943?

*To Mrs. Anna Mae Taylor, Acting Clerk of the Circuit Court,  
Hardee County, Wauchula, Florida:*

The provisions of Chapter 22309 authorize the Board of County Commissioners of Hardee County to employ an expert bookkeeper who shall serve as general accountant for the Board, and perform other duties as stated in the Act. Such employee of the Board is not specifically authorized to receive, in behalf of the County Commissioners, funds in his capacity as bookkeeper and auditor.

Candidates for office who are to be voted for wholly within a single county are, unless required to qualify with the Secretary of State under the provisions of a law relating to the particular office sought, required to qualify with and pay their filing fees to the Clerk of the Circuit Court "who shall receive the same in his capacity as clerk of the board of county commissioners of said county, . . ." See Section 102.33, Florida Statutes, 1941. This provision of law designates the official to whom such qualifying fees must be paid. It is my opinion that such provision is not modified by the provisions of Chapter 22309, Special Acts, 1943.

March 21, 1944.—044-89.

#### DETERMINING CANDIDATES' ELIGIBILITY—AMENDING RECORDS

**QUESTION:** When a man, who registered as a Republican on September 18, 1940, appears before the Secretary of the Democratic Executive Committee, takes oath and otherwise qualifies as a Democratic Candidate for Port Commissioner, District number 3, and his opponent now contends that he should withdraw and that his name could not possibly be printed on the Democratic ballot, are we authorized to place his name on the Democratic ballot?

*To Mrs. Easter L. Gates, Supervisor of Registration,  
Broward County, Ft. Lauderdale, Florida:*

It is my opinion that if the man who registered as a Republican executed the form of candidates' oath as prescribed by Section 102.29, Florida Statutes, 1941, and has stated therein that he is a member of the Democratic Party and has otherwise qualified by complying with the requirements of Section 102.33 with reference to filing such oath with the Clerk of the Circuit Court and paying the party assessment and statutory filing fee, then in that event it does not rest in the discretion of election



officials to pass upon his eligibility as a candidate. Questions relating to the eligibility of a candidate who has filed the statutory form of oath and has paid party assessment fees and the statutory filing fee are judicial questions to be determined by a court of competent jurisdiction.

In your letter you also state that a gentleman who is a Democratic candidate for Port Commissioner, District No. 3, was qualified through error by the Secretary of the Democratic Executive Committee as a candidate for the office of Port Commissioner, District No. 2. You state that the error was made by the Secretary of the Democratic Executive Committee and that the same was not in any way chargeable to the candidate. It is my opinion that if he tendered to the Secretary of the Democratic Executive Committee of your county his party assessment fee as a candidate for Port Commissioner District No. 3 and that through clerical error the Secretary listed him and issued to him a receipt showing payment of committee assessment as a candidate for District No. 2, this clerical error may be and should be corrected by the Secretary of the Democratic Executive Committee. The Secretary has, in my opinion, the authority to correct the record in this regard.

August 26, 1943.—043-219.

#### NOMINATION OF CANDIDATES

**QUESTION:** In the coming primaries, should the recognized political parties in Florida:

(1) Nominate a candidate for Member of Congress from the new Sixth Congressional District;

(2) Elect district delegates to the National Convention from said District; and,

(3) Elect members of a Congressional Executive Committee for the new Sixth Congressional District, from the counties comprising said District?

*To Honorable R. A. Gray, Secretary of State:*

The answer to the first question is in the affirmative. Chapter 21975, Laws of Florida, Acts of 1943, created a Sixth Congressional District and provided that, at the general election to be held in 1944, a Congressman shall be elected from such district. Sections 102.01 and 102.02, Florida Statutes, 1941, provide for the nomination, in a primary election, of candidates for all elective offices to be voted for in the next ensuing general election.

The answer to the second question is in the affirmative. Chapter 22058, Laws of Florida, Acts of 1943, provides that one male and one female delegate to the National Conventions of the political parties shall be elected from each Congressional District in the State, and that the remaining delegates shall be elected from the State at large.

The answer to the third question is in the negative. Section 102.07 (2), Florida Statutes, 1941, provides for the election of a Congressional Executive Committee of each political party; that such Committee shall consist of two members from each county in the Congressional District, who shall be elected for four years "at the primary elections held in the year 1942, and every four years thereafter." I find no provision of law for the holding of such election prior to the primary election to be held in 1946.

It is my opinion that, under the provisions of Section 102.07 (4), supra, the membership of each political party's Congressional Executive Committee for the Sixth Congressional District may be selected by the party's County Executive Committee in each county within said District.

June 28, 1943.—043-149.

#### NOMINATION OF PRESIDENTIAL ELECTORS

QUESTION: Has the State Democratic Executive Committee a right to name the eight Presidential Electors for the Democratic Party?

*To Honorable Tyn Cobb, Jr., Orlando, Florida:*

Section 98.07, Florida Statutes, 1941, provides for the election of Presidential Electors. Thereby the office of Presidential Elector is made elective. Section 102.02, Florida Statutes, 1941, provides that political parties as defined therein shall nominate their candidates for all elective offices under the provisions of Chapter 102, Florida Statutes, 1941. The Democratic Party in this state comes within the definition of a political party as defined by Section 102.02, supra. Chapter 102, Florida Statutes, 1941, provides for the nomination of all party candidates in the primary election, with certain exceptions which do not include Presidential Electors.

I am, therefore, of the opinion that democratic candidates for the office of Presidential Elector are required to be nominated in the state Democratic primary election.

August 31, 1944.—044-258.

#### SELECTION OF NOMINEE WHERE NO ONE IS NOMINATED

QUESTION: May a county Democratic Executive Committee select a nominee for the office of County School Board member, the name of such nominee to be printed on the general election ballot, in an instance where no one filed for nomination for such office in the primaries?

*To Mr. O. L. Dayton, Attorney at Law, Dade City, Florida:*

In the case of *State vs. Tyler* (1930) 130 So., 721, the Court held that the Republican County Executive Committee did not have authority to supply a candidate where there had been no primary held by that party and where there was a statutory method (by petition) to provide a candidate under such circumstances. The Court also held in that case that there is a distinction between vacancy in nomination and failure to nominate, and that failure to nominate did not come within the provisions of our then statute, Section 14 of Chapter 13761, Acts of 1939. Immediately following that case, the Legislature amended the statute by removing the provision for supplying a candidate in certain cases by petition except in municipal election. There were other amendments and that section as amended now appears as Section 102.48, Florida Statutes, 1941. The case differs from the one presented by your question in that in your case the Democratic Party duly held its primary; and the case is not controlling for another reason, namely, the elimination of the provision for placing the name on the election ballot by petition, and thus leaving a situation without any statutory remedy. All that remains of that case is the holding that a failure to nominate is not a vacancy in nomination, and that, therefore, it does not come within the provisions of the statute, Section 102.48.

In the case of *State vs. Mitchell* (1935) 159 So. 775, the Court held that where there has been no intention to evade the primary election laws and where all of such laws as are capable of being complied with have been observed by a political party, and there is no party candidate for the general election, and the statutes provide no method of nominating a candidate under such circumstances, the provision of Section 312 C. G. L. (Section 99.10 Statutes of 1941), "that all committee nominations shall be made as provided by the laws covering primary election" is not an unconditional limitation, and under such circumstances a recognized political party has the inherent right to supply a candidate according to its own rules and regulations.

In *State vs. Gray*, (1936) 160 So. 501, the majority opinion discussed, interpreted and followed the *Mitchell* case and said:

"Only when one of the major political parties of this state subject to the primary election laws has had the statutory opportunity to lawfully make its nominations for offices capable of being voted for in the regularly established June primaries, and has failed and neglected to do so as provided and required by such primary election laws, does such party forfeit its inherent party right to seasonably make executive committee nominations, or at its option to call and hold special primary elections, in order to have the names of its nominees for such offices as selected by it printed on the ensuing general election ballots in accordance with amended section 312 C. G. L., *supra*, as party candidates of such major political parties for the offices required to be filled at such ensuing general election. See *State ex rel. Chamberlin v. Tyler*, 100 Fla. 1112, 130 So. 721; *State ex rel. Summer v. Mitchell*, 118 Fla. 513, 159 So. 775."

Applying the law of those cases, it is my opinion that when a primary has been duly held by a recognized political party and no one filed for a particular office, resulting in a "failure of nomination," that political party, by its executive committee, may select a nominee for that office, and when the proper certificate has been signed, sworn to and filed as required by Section 99.10, Florida Statutes, 1941, it is the duty of the County Commissioners to place the name of such nominee on the ballot to be used in the general election.

September 15, 1944.—044-272.

#### VACANCY IN NOMINATION

QUESTION: 1. May the Democratic Party select a nominee for the office of County Surveyor (the name of such nominee to be printed on the general election ballot), in an instance where no one filed for nomination for such office in the primaries, and, if so, by what method?

2. May the Democratic Party select a nominee for the office of Justice of the Peace (the name of such nominee to be printed on the general election ballot), in an instance where the person nominated for such office in the last primaries has died, and, if so, by what method?

*To Honorable Edwin Thomas, Chairman, Democratic Executive Committee, Tampa, Florida:*

In my opinion the above questions are properly answered as follows:

1. The first question is answered in the affirmative, and the method whereby such nominee for County Surveyor may be selected is as follows:

A study of our primary laws and the cases of *State vs. Tyler* (1930) 130 So. 721, *State vs. Mitchell* (1935) 159 So. 775, and *State vs. Gray* (1936) 160 So. 501, leads me to the conclusion that the Democratic County Executive Committee of Hillsborough County can select a nominee for the office of County Surveyor either by primary to be called by it for that purpose, or by nomination by such executive committee, since the situation presented by this question is one of "failure of nomination" and since the Democratic Party participated in the last primaries there.

2. The second question is answered in the affirmative, and the method whereby such nominee for Justice of the Peace may be selected is as follows:

Since this vacancy in nomination has occurred more than thirty days prior to general election day, in pursuance of Section 102.48, Florida Statutes, 1941, a nominee for such office of Justice of the Peace may be selected by primary election to be called by such County Executive Committee. The situation presented by this question is one of "vacancy in nomination" as contemplated by said Section 102.48.

When nominees have been selected by the methods mentioned in the two preceding paragraphs, and when proper certificates have been signed, sworn to and filed as required by Section 99.10, Florida Statutes, 1941, it will be the duty of the County Commissioners of Hillsborough County to place the names of such nominees on the general election ballot.

June 8, 1944.—044-163.

#### VACANCY IN NOMINATION—REDISTRICTED COUNTY

**QUESTION:** Is there a vacancy in nomination created within the purview of Section 102.48, Florida Statutes, 1941, where, because of the redistricting of a county into Commissioners' Districts, there are no regularly nominated candidates for County Commissioner in some of the redistricted districts?

*To Honorable R. A. Gray, Secretary of State:*

It appears from the request for an opinion that prior to the May primaries just past the County Commissioners of one of the counties redistricted that county into new Commissioners' Districts. The effects of this redistricting was to leave one or more of the said districts without a regularly nominated candidate for County Commissioner.

Section 102.48, Florida Statutes, 1941, provides, in part, that in the event of the death, resignation or removal of any person nominated for office between the primary election and ensuing general election, **or if for any reason there is a vacancy in any nomination** or in any office and no method is otherwise provided by law for filling such a vacancy in nomination then in that event the County Executive Committee, in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office, and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary shall be held within ten days; provided that if any such vacancy should occur in any nomination for a county office or in any county office less than thirty days before a general election, the County Executive Committee shall fill such vacancy in nomination by selecting a nominee for such office, as in such law provided.

An investigation of the redistricting of the County Commissioners' Districts in Gulf County indicates that this was accomplished under the provisions of Chapter 22305, Acts of 1943, by election held April 18, 1944. Section 6 of such Act provides, in part, that if the plan for redistricting is approved, as in said Act provided, such change shall not become operative until the expiration of the term of the Commissioners who shall be holding by election for such district so to be changed; provided, however, that at the next primary and general election following the approval of such redistricting there shall be Commissioners elected for the new districts as approved at the election for redistricting, to take office at the beginning of the new term thereafter, according to law.

Assuming that such redistricting was lawfully effected, it appears from your letter that a vacancy in nomination exists with respect to one or more of such districts as contemplated by above Section 102.48 and, under such circumstances, in my opinion, such vacancy or vacancies in nomination mentioned by you may be filled by special primary called and held in the manner and as provided in Section 102.48.

It is noted that there is no provision in Section 102.48 as to the manner in which a special primary called by an Executive Committee shall be conducted, and the primary laws of the State seem to be silent with respect thereto. It seems advisable, therefore, that any such special primary election should be held as closely as possible in accordance with the law governing the regular primary elections as to the manner in which candidates shall qualify, the time within which they should qualify, etc.



Section 102.27 sets forth that no party assessment shall be made by any executive committee with respect to candidates in the event of a special primary election. However, there is no similar provision with respect to the filing fee required of each candidate by Section 102.31, which would indicate that this filing fee should be paid by candidates who participate in such special primary.

August 23, 1944.—044-249.

#### WAR BALLOTS—FILLING VACANCY IN NOMINATIONS

**QUESTION:** In the event of a vacancy in nomination caused by death and the time available is insufficient for a County Executive Committee to call a primary election to fill the vacancy as provided by Section 102.48, Florida Statutes, 1941, before war ballots must be printed and ready for mailing overseas, what course should be followed with respect to such vacancy, and the printing of such ballots?

*To Honorable Hinton J. Baker, County Attorney, Fernandina, Florida:*

Section 102.48 provides, as to a county office, that a primary be held by the County Executive Committee to fill a vacancy in nomination occasioned, among other things, by death, in the event such vacancy occurs thirty (30) days prior to the general election. Only the names of those candidates nominated in the primary, or who have been put in nomination by the appropriate executive committee, shall be printed on the general election ballots "providing that all committee nominations shall be made as provided by the laws governing primary election." Section 99.10. I find nothing in the appropriate laws with respect to war ballots which indicates that the general primary laws should yield to the extent of permitting an executive committee nomination in the instant case.

On the basis of the foregoing, it is my opinion that the above question is properly answered as follows:

1. Under the factual situation presented by the above question, a vacancy in nomination should be filled as provided by Section 102.48, Florida Statutes, 1941.

2. The war ballots should have thereon only the names of the candidates nominated as required by primary laws at the time of preparation of such ballots; and with respect to a vacancy in nomination as in the instant case, a blank line should be provided in the ballots under the office affected for the use of a "write-in" vote by those to whom the ballots are forwarded.



## CHAPTER VII

### OFFICES, OFFICERS AND RECORDS

#### HOLDING TWO OR MORE OFFICES

October 21, 1943.—043-278.

#### PUBLIC OFFICERS—DUAL OFFICES

**QUESTION:** May the legal adviser for the City of Jacksonville Beach be appointed by the Governor as a member of the Civil Service Board of Duval County?

*To Honorable R. A. Gray, Secretary of State:*

The Civil Service Board of Duval County was created by the provisions of Chapter 22263, Laws of Florida, Acts of 1943. Section 1 of said chapter in part provides:

"No member of the Board shall hold any other office under or be employed in any capacity by the United States, State of Florida, or any city or County of this State; . . ." (Emphasis supplied).

If said person is employed by the City of Jacksonville Beach as its legal adviser, it is my opinion that such employment is within the scope of the prohibition above quoted.

#### RETIREMENT; INSURANCE—EXPENSES AND APPOINTMENTS

January 21, 1943.—043-23.

#### WARRANTS DRAWN AGAINST TEACHERS' SALARY

**QUESTION:** Should the State Treasurer, as ex-officio Treasurer of the Teachers' Salary Fund, honor warrants drawn against the transportation portion of the Teachers' Salary Fund for payment of premiums for group insurance for bus drivers?

*To Honorable J. Edwin Larson, State Treasurer:*

Section 1, Chapter 20852, Laws of Florida, Acts of 1941, (Section 112.08, Florida Statutes, 1941), authorizes the County Board of Public Instruction "to provide for life, health, accident, hospitalization or annuity insurance, or all of any kinds of such insurance, for the employees thereof, upon a group insurance plan, and to that end to enter in agreements with insurance companies to provide such insurance."

Section 2 of said Act (Section 112.09, Florida Statutes, 1941), provides: "The election to exercise such authority shall be evidenced by resolution, duly recorded in the official minutes, . . . by the county board of public instruction. . . ."

Section 3 of said Act (Section 112.10, Florida Statutes, 1941), provides that "Upon the request in writing of any employee, the proper officials of each and every county, county board of public instruction . . . are hereby authorized and empowered to deduct from the wages of such employee, periodically, the amount of the premium which such employee has agreed to pay for such insurance, and to pay or remit the same directly to the insurance company issuing such group insurance."

It is my opinion that you are authorized under said Chapter 20852 to honor warrants drawn against the transportation portion of the Teach-

ers' Salary Fund for group insurance for bus drivers; however, before paying such warrant you should have satisfactory proof that the requirements of said statute have been complied with.

The County Superintendent should furnish you with:

1. A certified copy of the recorded resolution by the County Board of Public Instruction evidencing the election of said County Board to exercise its authority to purchase such group insurance for the employees.

2. A certificate certifying:

(a) That the total amount of such warrant is for payment of the premium of one or more of the types of insurance specified in the statute;

(b) That the amount of the warrant constitutes deductions from wages of employees which were payable from the transportation portion of the Teachers' Salary Fund; and

(c) That such deductions were requested in writing by each employee insured.

### COMMISSIONS

April 21, 1943.—043-101.

#### BOND—CANCELLATION IN RETURN OF COMMISSION TAX

QUESTION: 1. Where a person is appointed and qualifies as a member of the Board of Fire Commissioners, gives bond and executes oath of office as such, but does not perform any of the duties of the office, and the County Commissioners adopt a resolution cancelling the bond, should the Secretary of State cancel the bond?

2. Assuming the statements contained in the first question, should the \$10.00 commission tax, paid by the appointee, be refunded?

*To Honorable R. A. Gray, Secretary of State:*

1. As to this question it is my opinion that the bonds having been filed in the office of the Secretary of State voluntarily, and in due course, that they should remain as a part of the records of your office so that they would be forthcoming in the event it should ever occur that anyone, under lawful occasion, desired to examine the same or obtain a certified copy thereof, and this notwithstanding the fact that the appointee, having accepted and qualified for the office, did nothing toward the performance of the duties thereof.

2. From aught appearing, these funds were paid voluntarily by the appointee and passed in due course into the State Treasury.

Under Section 4 of Article IX of the Constitution and under the advisory opinions and judicial decisions which have been passed thereon, an appropriation either constitutional or statutory is necessary to authorize payment out of moneys in the State Treasury.

It is my opinion that in the absence of such an appropriation or relief bill, as it is sometimes called, you do not have, nor has the Treasurer the power to pay these funds out of the State Treasury for the indicated purpose.

February 29, 1944.—044-64.

#### FEES—LOCAL CIVIL SERVICE BOARDS

QUESTION: Is the Secretary of State's fee of \$10.00 for the issuance of the Governor's Commission to each member of the Civil Service Board of Duval County a proper charge to be paid by Duval County as a necessary expense of said Civil Service Board?

*To Mr. Richard P. Daniel, Attorney at Law, Jacksonville, Florida:*

The Civil Service Board of Duval County was created by Chapter 22263, Laws of Florida, Acts of 1943. Section 21 of said chapter provides that the Board of County Commissioners of Duval County shall:

"appropriate annually a sufficient sum of money to enable the Civil Service Board to properly carry out the purposes of this Act."

It is my opinion that the payment of the fee for commissions issued by the Governor, as provided by Section 113.01, Florida Statutes, 1941, is an expense necessary to be paid by those lawfully entitled, by appointment or election as provided by Chapter 22263, to receive such commissions, and since the obtaining of such commissions is a necessary incident to the lawful organization and functioning of such Board, and without which, the purposes of said chapter could not be carried into execution, it is my opinion that the members of the Civil Service Board of Duval County are entitled to reimbursement by the County of Duval for such commission fees.

My opinion of date August 25, 1943, relative to payment of fees for the issuance of commissions to members of the Everglades Fire Control District is hereby recalled for the purpose of rewriting the same so as to conform to this opinion.

October 8, 1943.—043-263.

#### SUBSTITUTION OF SURETY BOND FOR PERSONAL BOND

QUESTION: The Governor issued a commission as Justice of the Peace for District 3, Baker County, Florida, under date of December 30, 1940, for a term of four years; a personal bond was posted for the faithful discharge of the duties of office, which was signed by two reputable citizens as sureties, and this bond was duly approved by the Board of County Commissioners of Baker County and forwarded to the Secretary of State; thereafter the 1941 Legislature enacted Chapter 20523, Acts 1941, (Section 113.07, Florida Statutes, 1941) which provides in part as follows:

"(1) In all cases where public officials, not honorary, either state, county or district, are now, or shall hereafter be required to post fidelity or performance bonds, all such bonds shall be written by surety companies authorized by law to do business in the state of Florida.

"(3) No such official shall be qualified to hold office or perform the duties thereof until such surety bond has been filed."

Does the enactment of Chapter 20523 and the fact that there has not been substituted a bond written by a surety company authorized to do business in the State, in lieu of the previously posted personal bond, vitiate and void the commission?

*To Honorable W. C. Minger, Justice of the Peace,  
Baker County, Macclenny, Florida:*

It is my opinion that the enactment of Chapter 20523 and the fact that you have not substituted a surety bond for your personal bond do not vitiate or void your commission. It is my opinion further that the Act does not expressly operate retroactively to invalidate any existing commission or bond; but instead, that it operates to require all official bonds of public officers which are posted after the Act became effective to be written by surety companies authorized by law to do business in the State.

I am advised that since the evident purpose of the Act was to inaugurate a state policy designed to afford greater protection to the public, particularly in the case of officials handling public funds, the Comptroller on August 22, 1941, instructed all officials having personal bonds to replace them with surety bonds. Failure to comply with his instructions

does not invalidate commissions for which personal bonds were duly approved and posted prior to said Act for the reasons stated in my opinion aforesaid, nor did the Comptroller so construe the Act; but from the standpoint of affording greater protection to the public it is recommended that the Comptroller's instructions be complied with.

### MILITARY LEAVE OF ABSENCE

November 27, 1944.—044-329.

#### ACTING COUNTY COMMISSIONER—APPOINTMENT

**QUESTION:** Where a County Commissioner was granted a military leave of absence and an acting County Commissioner was appointed by the Governor for the present term of such office, and such County Commissioner (still in military service) was elected to succeed himself in office at the last (1944) general election, may the present Governor, whose term of office expires at the beginning of such new term, appoint an acting County Commissioner for such new term beginning the first Tuesday after the first Monday in January, 1945?

*To Honorable Spessard L. Holland, Governor:*

The power of the Governor to grant military leaves of absence to public officials appears to derive from Chapter 20718, Acts of 1941, as amended by Chapter 20863, Acts of 1941, which acts revised and modified the provisions of Chapter 7393, Acts of 1917, as the provisions of such acts are to be made applicable in the light of and read in conjunction with the executive powers of the Governor under the Florida Constitution. Such acts are now found in Chapter 115, Florida Statutes, 1941. These laws were construed for you by our Supreme Court in two advisory opinions dated May 12, 1942 and July 8, 1942, and found in 8 So. 2d. 26, and 9 So. 2d. 172.

A military leave of absence may be granted or denied by the Governor, upon appropriate application therefor, in his discretion, as the public interest may require (Section 115.10, Florida Statutes, 1941); and such leave of absence does not extend beyond the term of office with respect to which it is granted (Section 115.11, Florida Statutes, 1941). An application for military leave of absence for the new term beginning the first Tuesday after the first Monday in January, 1945, must be made by the County Commissioner referred to in the above question.

Since the granting of such a leave of absence depends upon the discretion of the Governor, as the public interest may require, it would seem the determination of whether or not such a requested leave should be granted is a responsibility devolving upon the Governor serving during the term with respect to which the request is made. Until such discretion has been exercised by the Governor, there is no occasion for appointment of an acting County Commissioner.

For the reasons aforesaid, in my opinion the above question is properly answered in the negative.

October 21, 1944.—044-309.

#### ACTING COUNTY JUDGE—EXPIRATION OF COMMISSION

**QUESTION:** In an instance wherein a leave of absence was granted by the Governor of Florida to a County Judge during the latter's active military service, when does the commission of an Acting County Judge appointed by the Governor for the period covered by such leave of absence expire?



*To Honorable H. Y. Reynolds, County Judge, Gadsden County, Quincy, Florida:*

You state that it is your understanding that such appointment extends only to the next general election.

An inspection of Book B-14, page 165, Records of Commissions, office of the Secretary of State, evidences that a County Judge of Gadsden County, Florida, applied for and was granted by the Governor of Florida under the stated authority of Chapters 20718 and 20863, Acts of 1943, leave of absence during the term of his active military service beginning June 16, 1943, and that you were appointed Acting County Judge of said county for the period covered by the leave of absence so granted. You state that you are the Democratic candidate for County Judge of your county, nominated at the last primaries, and wish to be advised if it will be necessary to obtain a commission for the two months intervening between the date of the coming general election and the time your term of office will begin in January, 1945.

The Supreme Court of Florida on May 12, 1942 (8 So. 2d. 20) and on July 8, 1942 (9 So. 2d. 172) rendered two advisory opinions to the Governor of Florida with respect to military leaves of absence of state and county officials, such opinions dealing with construction of said Chapters 20718 and 20863 (now a part of Chapter 115, Florida Statutes, 1941). In the latter of these cited opinions, speaking with respect to Judges of certain Courts, including County Judges, a majority of the Court stated:

"If, in case of absence with leave in war service other judges of similar courts below circuit judges cannot be transferred for temporary service in the place of an absent judge under statutes, or if such temporary transfers of such judges do not meet the public requirement of the office, the Governor may under sections 1 and 6, Article IV of the Constitution, accept the resignation of the judge during his war service or may declare a compulsory absence from official duty of the judge in war service during the war service and appoint a proper person to perform the duties of the office during such absence of the judge or until the end of his term, subject in all cases to the return of the officer from war service."

Accepting these advisory opinions as the law on the point, it appears that the answer to the above question is that your appointment extends to the end of the term for which said Judge was elected, unless he returns from military service prior thereto and assumes the duties of such office.

January 15, 1944.—044-15.

#### APPOINTMENT OF DEPUTY—BOND

QUESTION: 1. Can a deputized acting Clerk appointed under Section 115.03, Florida Statutes, 1941, appoint deputies in the Clerk's office while he is so acting?

2. Does such deputized acting Clerk have the power to appoint other deputies under him?

3. Should all official documents after leave of absence of the official Clerk and appointment of a deputized acting Clerk be signed by such deputized acting Clerk and only by such?

*To Honorable Spessard L. Holland, Governor:*

Answering these questions in their order, it is my opinion that:

1. The deputized acting Clerk appointed under Section 115.03 by the Clerk can appoint Deputy Clerks while he is so acting, since he has the power to perform "all of the duties that may devolve upon the officer appointing him."

2. Such deputized acting Clerk has the power of appointing deputies under him, but they will not be appointed as deputies under the deputized acting Clerk but as deputies under the official Clerk.

The foregoing answers the questions propounded, but I will call your attention to these additional matters.

Chapter 21956, Acts of 1943, relates to the power of Circuit Clerks to appoint deputies generally and not in the specific instance of where he is appointing an acting Clerk. This Chapter 21956 provides that regular deputies of the Circuit Clerks "shall have and exercise each and every power of whatsoever nature and kind as the clerk himself may exercise, excepting the power to appoint a deputy or deputies." In this exception these regular deputies are denied the power of appointing deputies as the only power of the official Clerk which they cannot exercise.

Under the statute (Section 115.03) providing for the appointment of the deputized acting Clerk, when the official Clerk is away on a military leave of absence, this deputized acting Clerk has the power to "perform all the duties that may devolve upon the officer appointing him," which, in my opinion, gives the acting Clerk the right to name deputies for the Clerk in the latter's absence aforesaid. This deputized acting Clerk does not have to sign his own name as a part of the signature of the official Clerk and he does not have to sign all papers issued by the Clerk's office. I think the law contemplates all papers to continue to be signed as they previously were when the official Clerk was present, but gives the deputized acting Clerk the power and right to sign the official Clerk's name.

The statute (Section 115.03) requires the deputized acting Clerk to give a bond conditioned for the faithful performance of his duties, which bond I think should be made payable to the Governor of the State and his successors in office and the official Clerk, as I think this bond is intended to protect both the public and the official Clerk from any unfaithfulness on the part of his acting Clerk.

Section 113.04 provides that the premium on any bond such as the one required under Section 115.03 shall be paid from the necessary and regular expense of the department to which such bonded official is to be attached.

March 28, 1944.—044-103.

#### BOARD OF PUBLIC INSTRUCTION—EMPLOYEES

QUESTION: 1. Is a teacher employed by the County Board of Public Instruction entitled to pay under Section 115.09, Florida Statutes, 1941, on being granted a military leave of absence after being fully compensated for the school year by being paid on an eight-months' basis, but being employed for the 1944-45 school term?

2. If the answer to (1) above is in the affirmative, what will constitute "30 days' pay"?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 115.09, Florida Statutes, 1941, is made applicable to school teachers employed by the County Board of Public Instruction by Section 115.14, Florida Statutes, 1941. (See pages 99-100, Biennial Report of the Attorney General, 1941-1942).

Such section is to be liberally construed as it was manifestly the intention of the Legislature that County Boards should compensate covered employees for the 30 days subsequent to the grant of the leave of absence. The compensation such teacher would be entitled to would be determined by dividing the annual salary of the teacher for the school year by 12.

It is therefore my opinion that the teacher, under the circumstances outlined, is entitled to be paid and the County Board is entitled to pay such teacher for the 30 days subsequent to leave of absence, to be determined in the manner above set out.

June 8, 1943.—043-138.

#### COMPENSATION—FIRST THIRTY DAYS

**QUESTION:** What should be the measure of compensation to state and county officials, granted military leaves of absence under the statute, for the first thirty days of that leave, when the compensation received by these officials consists of fees, or of a fixed salary together with fees?

*To Honorable Frank B. Thrower, County Judge, Quincy, Florida:*

I am of the opinion that an official receiving leave of absence should be paid the thirty day "full pay" allowance provided by statute, the amount of such allowance to be ascertained as of the date the leave of absence is granted and becomes effective, as salary applicable to the first month of the leave of absence, with a vested right to the payment of any further ascertainable salary as soon as the same shall have become determinable.

The measure of compensation to be paid the officer granted leave as aforesaid, when the compensation received by that official consists of fees, or of a fixed salary together with fees, would be the average monthly compensation of the incumbent of that office over a period of, say, three or more years, including the regular monthly salary being received by that official, with an adjustment of such compensation being made when the total income of the office is determined at the end of the current year. However, such compensation should never exceed the statutory limit fixed by law for that office.

Under the statutes, official opinions may be rendered only to state officers and boards, therefore this opinion should be taken as unofficial.

November 14, 1944.—044-320.

#### COUNTY SUPERINTENDENT—APPOINTMENT OF SUBSTITUTE

**QUESTION:** 1. If the acting Superintendent of Public Instruction resigns, does the County Board of Public Instruction have the authority to appoint a successor?

2. If the Superintendent on military leave is a successful candidate for re-election but is still on military leave at the time of the beginning of his new term, does the acting Superintendent continue to hold office or is it necessary for the Board of Public Instruction to again take action in the matter of appointing a Superintendent?

*To Honorable Colin English, State Superintendent of Public Instruction:*

It is my understanding of the Advisory Opinion to the Governor, dated May 12, 1943, reported in 8 So. (2d) 26, and the supplementary Advisory Opinion to the Governor, dated July 8, 1942, reported in 9 So. (2d) 172, insofar as those opinions relate to County Superintendents, that grant of military leave of absence must be by the Governor, who thereupon directs the Board of Public Instruction to designate a suitable person as acting Superintendent to perform the duties of the office during the leave of absence. I am not advised as to the manner or form in which the Governor may have directed the Board of Public Instruction in this instance to designate a suitable person, but unless such direction may have been restricted by its terms to the present acting Superintendent, or otherwise restricted, I am of the opinion that, upon the latter's resig-

nation, the County Board of Public Instruction would have the power to appoint a successor acting Superintendent.

Answering your second question, it is my opinion that, unless the Superintendent returns to resume his duties prior to the end of his term, or a vacancy occurs in the office, the appointment of a person to perform the duties of a County Superintendent during the latter's military leave of absence continues to the end of the term and until the qualification of a duly elected or appointed successor, whether or not the successor be the same person. When the Superintendent elected to succeed himself qualifies for the new term, it is my opinion that he should again obtain a leave of absence from the Governor and, under the direction of the Governor, the Board of Public Instruction should thereupon make a new appointment of a person to perform the duties during the continued military absence of the County Superintendent.

March 24, 1944.—044-95.

#### EMPLOYEES NOT ENTITLED TO LEAVE

**QUESTION:** Is an inspector employed by the Motor Vehicle Department, who has resigned to train for Merchant Marine service as a seaman under the Maritime Commission, entitled to a military leave of absence with an allowance of thirty days' pay under Sections 115.08 - 115.15, Florida Statutes, 1941?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

A military leave of absence is granted in order to permit an official or employee to enter "active military service" which is defined in Section 2 of Chapter 20718, Acts of 1941, as follows:

"Section 2. **Definitions.**—The term 'active military service' as used in this Act shall signify active duty in the Florida Defense Force or Federal service in training or on active duty with any branch of the Army of the United States, the United States Navy, the Marine Corps of the United States, the Coast Guard of the United States, and service of all officers of the United States Public Health Service detailed by proper authority for duty either with the Army or the Navy, and shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

In view of the quoted language it is my opinion that the governing statutes do not authorize you to grant the employee in question a military leave of absence with thirty days' full pay.

June 8, 1943.—043-135.

#### EMPLOYEES—REINSTATEMENT

**QUESTION:** A former full time employee of the Florida Crippled Children's Commission was granted leave of absence for the duration of the war in order that she might enter one of the armed services, and was paid one full month's salary at the time a leave was granted; this person may now be discharged from the service by reason of physical disability, and may want to return to her former position with the Commission.

In connection with the foregoing:

- (1) Should the Florida Crippled Children's Commission reinstate this person in her former position at the same salary?
- (2) Should the Florida Crippled Children's Commission demand a return of the month's salary granted on the leave?



*To The Florida Crippled Children's Commission:*

With reference to the first question, the statutes, Sections 115.11-115.15, inclusive, Florida Statutes, 1941, provide that employees may be granted leave of absence to enter the armed services, and on such leave being granted, said employees shall be entitled to the same rights and privileges, as near as may be, as are afforded public officers who are granted leave of absence for service in the armed forces. One of such privileges is the absolute right during the term of office of the original employer, to return to the former position of employment, and it is my opinion that your Commission, upon discharge of such person from the armed services, and on application by her, should reinstate such person in her former position at the salary she was receiving at the time leave of absence was granted, provided there has been no general reduction of salaries for employees similarly situated. If there has been such a general reduction of salaries, then such person may be re-employed on the reduced salary schedule.

If, in the meantime, the terms of office of the original employers have terminated, the successor employers, by the phrase "insofar as may be," appearing in the statute, are vested with certain discretion in reinstating such former employee; that is, the successor employers, depending upon existing conditions at the time of application for reinstatement, may decline reinstatement for cause.

With reference to your second question, the law does not impose any duty upon an employee to refund the month's salary paid at the time leave of absence was granted. Therefore, in my opinion, your Commission should not demand a return of such salary payment.

February 28, 1944.—044-62.

**MILITARY SERVICE—MUNICIPALITIES**

**QUESTION:** Has the Governor of Florida the authority to grant a military leave of absence to municipal officers?

*To Honorable Spessard L. Holland, Governor:*

Section 115.09, Florida Statutes, 1941, seems to bear upon this question. It reads:

"All state and county officials in the State of Florida, and all others who hold office under the government of the State of Florida, and who are officers or enlisted men either in the Florida defense force, the national guard, the naval militia, marine corps, unorganized militia, United States Army Reserve, United States Navy Reserve, United States Marine Corps Reserve, United States Coast Guard Reserve, or officers or enlisted men in any other class of the militia, or county school officers, and all municipal officials in the State of Florida, may, subject to the provisions and conditions hereafter set forth, be granted leave of absence from their respective offices . . ."

You will note that municipal officials are specifically referred to and are permitted the same benefits under this section of our law as are state and county officials.

Section 115.10 provides that you are to grant leaves of absence or deny same. Said section reads:

"Application for such leave of absence shall be made to the governor of the State of Florida and may be granted or denied by the Governor in his discretion, as the public interest may require."

I am therefore of the opinion that it was the intent of the Legislature in the passage of the 1941 laws, which are contained in the above quoted sections, that you should be the proper official to pass upon requests for leave of absence for municipal officers.

July 24, 1943.—043-179.

### PAYMENT OF THIRTY DAYS' FULL PAY

**QUESTION:** Where a state or county officer, who is paid in whole or in part from fees earned (for example, a County Judge), is granted leave of absence under Chapter 115, Florida Statutes, 1941, from what fund or account should the full pay for the first thirty days of said leave of absence, provided by Section 115.09, Florida Statutes, 1941, be paid?

*To Honorable Bryan Willis, State Auditor:*

In answering this question, let us observe the different conditions and circumstances which may obtain in the several counties of the State:

- (1) In some counties the excess fees of the office will be ample to meet the said thirty days' full pay.
- (2) In other counties the said excess fees of the office, although insufficient to meet the entire thirty days' full pay, will be sufficient to meet a part thereof.
- (3) In other counties there will be no excess fees of the office.

To the extent any officer granted said leave of absence is paid a salary from a definite and fixed fund, that portion of his thirty days' full pay should also be paid from that fund, and not from any other fund.

1. If the excess fees of the office are sufficient from which to pay the entire thirty days' full pay, then the entire sum should be paid from such excess fees of the office.

2. If there are excess fees of the office, although they are insufficient to pay the entire thirty days' full pay, they should be applied toward the payment thereof, and the balance paid as set out in the following paragraphs under 3.

3. Section 115.09, Florida Statutes, 1941, although providing for full pay for the first thirty days to an officer absent on military duty with leave, makes no provision as to the fund from which such payment is to be made. If the office has in its excess fee fund a sufficient amount, the same may be paid therefrom, or to the extent of the said excess fee fund. If there is no such excess fee fund, or such fund is insufficient, then the payment must be made from some other fund, if made at all.

Under the County Budget Law (Chapter 129, Florida Statutes, 1941) all items must be budgeted that may reasonably be contemplated; which budget, in legal effect, becomes an appropriation and must be followed. Under said Budget Law a fund may be included in the county budget for "contingencies and emergencies," from which fund items which could not have been reasonably contemplated when the budget was made up may be paid.

I am, therefore, of the opinion that where there is no excess fee fund, or such fund is insufficient for the payment of the amount due an officer granted leave of absence for military duty, the same may be paid from the fund in which it was budgeted, or, in the absence of a budgeted item in some fund for such purpose, from the fund provided for "contingencies and emergencies," in case the amount might not have reasonably been contemplated when the budget was made up. In case the fund from which the payment is to be made is insufficient in amount, then under proper circumstances a transfer of funds may be made from other funds, under Section 129.03, Florida Statutes, 1941, for the purpose of making payment.

March 24, 1943.—043-81.

#### TEACHERS AND PRINCIPALS—SALARY

**QUESTION:** Does the payment for the statutory thirty-day period of salaries to teachers and principals granted military leave of absence violate constitutional limitations governing the use of school funds?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I refer you to my opinions of April 21, 1942, and December 31, 1942, in which, as well as in opinions to other State Departments, I have held that while the granting of leave of absence was discretionary with the employing authority, once leave of absence is granted for military reasons, the person to whom it is granted automatically becomes entitled to thirty days' compensation, as prescribed by said statutes.

It is my opinion that by said Chapter 20718, as amended by Chapter 20863, it has been legislatively determined that such teacher or school employee is to be considered as actively engaged in school duties during such thirty-day period; and that it should be considered in the same category as a temporary leave of absence for reasonable periods, such as sick leave, illness in line of duty leave and professional leave, for which the payment of salary has been uniformly sustained.

It is, therefore, my opinion that the above question should be answered in the negative.

#### POWERS AND DUTIES OF STATE OFFICERS AND AGENCIES

January 6, 1944.—044-7.

##### STATE PROPERTY; SALE—SECURING DEPOSIT OF PROCEEDS

**QUESTION:** Can the deposit of funds received by the Superintendent of Florida State Hospital from pay patients and from the sale of farm produce and manufactured products, and deposited in a bank account under the jurisdiction and control of said Superintendent, legally be secured by collateral deposited with the State Treasurer under an agreement between the State Treasurer, the bank and the Superintendent of said Hospital?

*To Honorable J. Edwin Larson, State Treasurer:*

Your question presupposes a right in the Superintendent of the Florida State Hospital to deposit such funds in a bank account under his jurisdiction and control, whereas said Superintendent, in my opinion, has no such right.

Section 116.13, Florida Statutes, 1941, specifically provides that the Superintendents of State Asylums and the Presidents and Principals of all State Educational Institutions are prohibited from selling or otherwise disposing of property belonging to the State except in cases where they have previously obtained permission from their respective Boards of Commissioners or Trustees.

Section 116.14, Florida Statutes, 1941, provides that upon the sale of any state property by the Superintendents and Presidents of State Institutions, as provided by law, they shall take receipt for the same from the purchaser, which receipt shall be forwarded, together with the proceeds of the sale, to the State Treasurer.

All farm produce raised on farms operated by the Florida State Hospital, and all products manufactured by said Hospital, constitute state property within the contemplation of the statutes referred to. Also, funds derived from pay patients take the place of or pay for state property used

and consumed by such pay patients and are within the contemplation of the foregoing statutes.

It is, therefore, my opinion that such deposits by the Superintendent of the Florida State Hospital cannot be secured as you suggest, because there is no authority for the making of such deposits by him. The statutes, in my opinion, contemplate that all such funds shall be forwarded immediately to the State Treasurer.

### NOTARIES PUBLIC

December 21, 1943.—043-337.

#### CITIZENSHIP PREREQUISITE TO APPOINTMENTS

**QUESTION:** Can an individual who is not a citizen of the United States be appointed a Notary Public in the State of Florida?

*To Honorable Spessard L. Holland, Governor:*

In reply I wish to advise that I am of the opinion that in order for a person to be appointed a Notary Public in the State of Florida he must be a citizen of the State of Florida, which of course presupposes that he is a citizen of the United States. I base this opinion upon the fact that under Article XVI, Section 15 of our Constitution it is there recognized that a Notary Public is a state officer because this section relates to a person holding or exercising the functions of any office under any foreign government, under the Government of the United States or this state, and provides that such person shall not be an officer of the State of Florida, and that no person shall hold more than one office at the same time except that it is provided that Notaries Public may be elected or appointed to fill any legislative, executive or judicial office.

Although some courts hold that a person is not rendered ineligible to public office by the fact that he is not a citizen (Annotation 120 A. L. R. 677), other courts have taken the view that even in the absence of constitutional and statutory provisions on the subject, an alien is not eligible to hold public office (*State ex rel. Off v. Smith*, 14 Wis. 497). Although this particular question has never been presented to the Supreme Court of our State, it quoted with approval the above cited Wisconsin case, for in the case of *State ex rel. Attorney General v. George*, 23 Fla. 585, 3 So. 81, our Supreme Court said:

"The case of the *State v. Smith*, 14 Wis. 497, in which it was held that an alien was ineligible to the office of sheriff, although elected to it, is not considered in conflict with the cases before cited. The reason given for the decision is a good one,—that ours are governments for the good of the people who compose the citizenship of the country, and it is inconsistent with the nature and spirit of such governments that aliens, who owe allegiance elsewhere, should be permitted to have a share in the conduct of public or official business."

In this case the question before the court was whether or not a person who was elected to public office was a qualified elector. The Supreme Court pointed out that with regard to this particular office, the constitution and statutes were silent concerning whether or not a person holding said office had to be a qualified elector. I do not find in any of our laws where a Notary Public must be a qualified elector. However, I am of the opinion that an alien is ineligible to hold the office of Notary Public in the State of Florida.



April 15, 1943.—043-100.

#### MINORS—APPOINTMENT UPON REMOVAL OF DISABILITIES

QUESTION: May minors whose disabilities have been removed hold the office of Notaries Public?

*To Honorable Spessard L. Holland, Governor:*

The case cited by the Judge, *State ex rel. Lamson vs. Baker*, 60 So. 445, was not taken into consideration when the late Judge Landis, in an opinion under date of June 18, 1937, held that the removal of disabilities of nonage of a minor would not permit her to hold office and, therefore, be a Notary Public. The case above mentioned held that a minor should be admitted to the Bar after removal of his disabilities even though the statutes governing the admission to the Bar required an applicant to be twenty-one years old.

Section 117.02, Florida Statutes, 1941, makes the specific provision for the appointment of a woman over the age of twenty-one years as a Notary. The situation, therefore, is, as the Judge points out, analogous. When a person is admitted to practice law he becomes an officer of the Court and since the Court is a State Institution and all the personnel are, therefore, state officers, I can see no distinction between one type of officer and another.

I, therefore, overrule the opinion by the former Attorney General under date of June 18, 1937, and now hold that any persons whose disabilities have been removed are eligible to appointment as Notaries Public.

March 30, 1944.—044-109.

#### USE OF ASSUMED NAME

QUESTION: May an applicant for the position of Notary Public use a name other than her real name?

*To Honorable Spessard L. Holland, Governor:*

Under date of October 18, 1939, my predecessor in office rendered an opinion on this same question. He stated:

"... it is my advice that in order for the bond of an applicant for the position of notary public or other officer to be binding, it would seem proper for the bond to be made under the real name of the applicant and not under an assumed name..."

I concur in this for the reason that I feel that a Notary Public should use her real name. I realize of course that a person can change her name at any time and there is nothing unlawful about the same; however, on official documents and papers I think the true name of the party should be used.

If said person desires to use a name other than her real name I suggest that she obtain a court order to that effect, then if she is commissioned a Notary Public there can be no question as to the authenticity of her actions as such.

#### GENERAL PROVISIONS

January 17, 1944.—044-24.

#### EVERGLADES FIRE CONTROL DISTRICT—EXPENDITURE FOR CONSTRUCTION OF BUILDING

QUESTION: Does Chapter 19274, Acts of 1939, authorize the Chief of the Everglades Fire Control District, with the approval of the Commissioners thereof, to construct a building or buildings to be used for offices, storage and maintenance shop for equipment?

*To Mr. Guy J. Bender, Chief of the Everglades Fire Control District,  
Belle Glade, Florida:*

Section 9 of the Act grants power to purchase, lease, rent or hire such labor services, teams, equipment or machinery as may be deemed necessary in establishing fire patrols in the district.

In *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 792, the court commented:

"When authority is given by statute to accomplish a stated governmental purpose, there is also given by implication authority to do everything necessary to accomplish the purpose that is not a violation of law or public policy."

The statutory grant of power found in Section 9 carries with it every other power necessary and proper to the execution of the power expressly granted and this, it would seem, authorizes housing to protect valuable equipment and for repair facilities and offices. A moderate expenditure for these purposes obviously would save further rent and storage and reduce sums for upkeep and repair, thereby resulting in economic and efficient operation, the desired end.

Although my conclusion is that under the statute reasonable construction may be resorted to, I do not find power vested in the Everglades Fire Control District to own real estate. Under the terms of Section 3 the Commissioners of the District may only use state property as shall be adaptable, upon such terms and conditions as may be agreed upon between the Board of Commissioners of the Everglades Fire Control District and the Board of Commissioners of State Institutions.

## CHAPTER VIII

### COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

#### COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

August 11, 1943.—043-199.

#### COUNTY JAILS—RESPONSIBILITY FOR SANITARY CONDITIONS

QUESTION: 1. What authority is responsible for the sanitary conditions and accommodations of a county jail?

2. What authority can compel correction of same primarily?

3. Is there an authority which can move and compel the primary authority to act?

4. What is the jurisdiction of the State Board of Health in the matter of supervising the sanitary conditions of county jails?

5. What is the State Law requiring grand juries to investigate county jails?

6. Is there a general statute authorizing the use of county jails by municipalities?

7. Does the Board of Commissioners of State Institutions have any jurisdiction whatsoever over the maintenance, upkeep, sanitary conditions or adequacy of jail accommodations with respect to county jails?

*To Honorable Spessard L. Holland, Chairman,  
Board of Commissioners of State Institutions:*

I have grouped questions 1, 2 and 3 in my first answer:

The county jail, being county property, is by reason thereof under the control and supervision of the Board of County Commissioners in the absence of any express provision of law to the contrary.

The Sheriff exercises custody of the jail by reason of the fact that he has charge of all prisoners committed. However, there is no express provision of law giving him any such custody or control over a county jail.

Section 142.01, Florida Statutes, 1941, provides that the Fine and Forfeiture Fund of the county shall be paid out only for criminal expenses, and it is my opinion that the care and maintenance of the county jail is a bona fide criminal expense.

Section 950.05, Florida Statutes, 1941, provides that the Board of County Commissioners shall arrange jails so that negro and white prisoners, or male and female prisoners shall not be confined together.

Section 135.01, Florida Statutes, 1941, provides that the Board of County Commissioners, if they deem it necessary to erect or repair a jail, may levy a building tax, after certain notice, not exceeding five mills per annum for such purpose.

Section 30.25, Florida Statutes, 1941, provides that the Sheriff shall receive 75c a day for feeding twenty prisoners or less, and 60c a day for all over twenty.

Section 30.23, Florida Statutes, 1941, provides that the Sheriff shall be paid not more than \$2.00 a day for guards and not more than \$1.00 a day for servants.

In *Brown vs. St. Lucie County*, 153 So. 906, the Supreme Court of Florida holds that the Sheriff may employ as many guards and servants as are necessary to take care of the county jail, but their compensation must not exceed \$2.00 for each guard and \$1.00 for each servant.

In *Smith vs. State*, 154 So. 184, the Supreme Court of Florida holds that the fee provided for Sheriffs in connection with the keeping of prisoners in jails is not for keeping them in jail, but for feeding them.

4. Section 381.49, Florida Statutes, 1941, provides that the State Board of Health may make and enforce such rules and regulations covering sanitation and quarantine as may be necessary for the protection of the public health; and Section 381.50, Florida Statutes, 1941, provides that this sanitary code may include regulations covering the sanitation of jails, etc.

5. Section 905.11, Florida Statutes, 1941, provides that the Court shall charge the grand jury concerning its duties, and Section 905.16, Florida Statutes, 1941, provides that the grand jury shall inquire into the commission of offenses committed in the county, but there is no law requiring grand juries to investigate and inspect county jails. However, in *Re Report of Grand Jury*, 11 So. (2d) 316, the Supreme Court of Florida says:

"The charge 'concerning their duties' must of course be encompassed within the oath and the statutes but it is well known that by their charge trial courts have directed the grand jury to investigate every offense that affected the morals, health, sanitation, and general welfare of the county. The charge also goes to the investigation of county institutions, buildings, offices, and officers and directs them to make due presentment concerning their physical, sanitary, and general condition. The grand jury is in other words the guardian of all that is comprehended in the police power of the State."

My opinion, predicated upon these statutes and the Supreme Court holding, is that by custom prevailing in this state for many years, it has become an implied duty of the Court to charge the grand jury regarding inspection and investigation of the sanitary and other housing conditions existing in the county jail, and for the grand jury to comply with this charge.

6. I find no general law authorizing the use of county jails by municipalities. However, I am of the opinion that this use could be provided for by special act in any particular county.

7. Section 952.01, Florida Statutes, 1941, provides that the Board of Commissioners of State Institutions shall employ convict inspectors, and Section 952.02, Florida Statutes, 1941, provides that it shall be the duty of a convict inspector to inspect each jail and all the prisoners therein within his district once each month; and Section 952.06, Florida Statutes, 1941, provides that the Commissioner of Agriculture shall submit to the Board of Commissioners of State Institutions any adverse report of the convict inspector in connection with prisoners and prison camps of this state, and that the Board shall investigate such matter without delay and take whatever steps are necessary to remedy any improper condition which may be found to exist.

Summarizing from all of the above, I am of the opinion that:

It is the duty of the Sheriff to keep the county jail in a sanitary condition, insofar as it is possible for him to do so with the facilities furnished by the Board of County Commissioners and by the employment of guards and servants whose pay must not exceed \$2.00 a day and \$1.00 a day respectively, and if such facilities are not available to the Sheriff or provided by the Board of County Commissioners, it is his duty to report to the County Commissioners and demand of them whatever is necessary to accomplish this purpose.



I am of the opinion that it is the duty of the Board of County Commissioners to see that the county jail is kept in a sanitary condition, or to so keep it themselves or to furnish the Sheriff with the facilities for so doing; that in the event either the Sheriff or the Board of County Commissioners fails to do so said Sheriff or Board is guilty of nonfeasance and neglect of duty and subject to removal from office by the Governor.

I am further of the opinion that it is the duty of the State Board of Health to inspect the sanitary conditions of county jails, and that a report of such inspection should be furnished to the Sheriff, the Board of County Commissioners, and the Board of Commissioners of State Institutions, and if any unsanitary conditions are found, that the Board of Health should request the Board of County Commissioners to correct same, and upon the Board's failure to do so, that this condition should be called to the attention of the Governor and the Board of Commissioners of State Institutions.

As to the right of municipalities to use county jails: Although there is no general law expressly providing for the use of county jails by municipalities, this practice is not prohibited by law, and upon contract between the Board of County Commissioners and the municipality involved such facilities can be legally made available, but not at the cost of improper conditions in the county jail for the county prisoners. The primary purpose of the county jail is to provide a place of confinement for county prisoners. Where facilities are already overcrowded with county prisoners, I am of the opinion that neither the Board of County Commissioners nor the Sheriff has any authority to allow the county jail to be used for incarceration of municipal prisoners.

As to jurisdiction of the Board of Commissioners of State Institutions: In view of the fact that the duties of convict inspectors employed by the Board of Commissioners of State Institutions provide for the inspection of county jails and reports thereon to said Board, I am of the opinion that this Board is thereby charged with the duty of seeing that county jails are kept in a sanitary condition, and that if the Board of County Commissioners and the Sheriff are persistently derelict in their duties in this respect, it is the duty of the Board of Commissioners of State Institutions to recommend to the Governor that the Board of County Commissioners or the Sheriff, as the case may be, be removed from office unless such unsanitary condition or other complained of illegal, inadequate or improper jail condition is corrected.

August 9, 1943.—043-195.

#### COUNTY OFFICERS—EXPENSES

**QUESTION:** What supplies and expenses for operating the office of County Judge should be furnished or paid by the Board of County Commissioners?

*To Honorable Bryan Willis, State Auditor:*

It seems that there is some controversy between the Board of County Commissioners and the County Judge of Brevard County which occasioned this request. Apparently the County Commissioners would not pay for typewriter ribbons and yet would pay for carbon paper for the typewriters. Their action appears to be based upon an opinion from this office under date of February 13, 1933, wherein the then Attorney General held that the County Commissioners were required to pay for typewriters, adding machines, etc., but were not required to pay for typewriter ribbons, or to furnish the Clerk of the Court with blank deeds, mortgages, chattel mortgages, leases, etc., yet the then Attorney General further held that "I think that all necessary stationery, blanks, and forms which the law requires a county officer to use in his official duties may be furnished and

paid for by the County Commissioners under the statute authorizing them to furnish and pay for stationery." It is not possible for me to reconcile this statement in the opinion with the first statement quoted with regard to typewriter ribbons as I am of the opinion that typewriter ribbons are furnished either as stationery or as a part of the office supplies that the particular county officer needs to carry out his official duties. And, while I do not think the county should furnish him with blank deeds, mortgages, etc., I am of the opinion that he should be furnished such office supplies as will enable him to carry out his official duties.

The sections mentioned in the Attorney General's opinion under date of February 13, 1933, as Sections 475, 476 and 1990, C. G. L., are now Sections 116.07, 116.08, and 283.21, Florida Statutes, 1941, respectively. I therefore overrule that part of the opinion of the Attorney General under date of February 13, 1933, with reference to the furnishing of typewriter ribbons by the County Commissioners.

August 17, 1943.—043-210.

#### EXPENDITURE FOR REPAIR

**QUESTION:** The Board of Public Instruction of Sumter County is planning to purchase a building in Bushnell and to put its offices in this building. It appears that the Board is spending all the money it is allowed to spend in this regard to purchase said building and is asking the County Commissioners for \$1,000.00, and this \$1,000.00 is to be used to repair the building so that it will be suitable for school offices, such as the Superintendent's office, etc. May the Board of County Commissioners of Sumter County provide said amount of \$1,000.00 for the purpose stated?

*To Honorable James W. West, Attorney, Board of County Commissioners, Sumter County, Bushnell, Florida:*

Section 4, Article XVI of the State Constitution provides in part:

"All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties."

Section 6, Article VIII of the State Constitution provides for the office of County Superintendent of Public Instruction.

Section 230.29, Florida Statutes, 1941, provides:

"The county superintendent shall have his office at the county seat. **Office space shall be provided** and heat and light furnished by the board of county commissioners; provided, however, that in the event such office space as above required is **not provided by the commissioners**, the county board may provide such space as is needed. The office shall be provided with furniture, equipment, telephone, supplies, and other essentials by the county board." (Emphasis supplied).

Section 230.17, Florida Statutes, 1941, provides:

"All regular and special meetings of the county board shall be held at the county seat and in the office of the county superintendent or in a room convenient to that office and regularly designated as the county board meeting room."

Attention is also called to Section 242.09, Florida Statutes, 1941, which provides for the acquisition of real estate for educational purposes by a Board of County Commissioners, after approval by an affirmative vote of the qualified voters of a county or of a Special Tax School District, who are taxpayers and have paid all taxes due by them for two years next preceding such vote, which section is interpreted in *Lankford v. Odom*, 77 Fla. 282, 81 So. 469, and later related cases.

Section 230.29 is part of the School Code enacted by the 1939 Legislature, while Section 242.09 is taken from an Act of the Legislature of 1899. Section 242.09 relates solely to the acquisition of real estate for school purposes, whereas Section 230.29 relates to the specific subject of providing office space for the County Superintendent.

It appears that the County School Board of your county will purchase the building out of its funds, and is requesting the County Commissioners to pay the expense of repairing and making the purchased building suitable for the school offices.

The statutory authority given the Board of County Commissioners to provide office space at the county seat for the County School Superintendent contemplates that the Board shall make all necessary expenditures for such purpose. The statute further provides that if the County Commissioners do not provide such office space the County School Board may provide such space as is needed.

It appears that this grant of authority is broad enough for the two County Boards, either acting independently of, or in cooperation with, the other to make necessary expenditures to provide office space for the County School Superintendent. Therefore, assuming that your Board, after taking into consideration all of the facts, including the necessity for providing office space for the County School Superintendent, fairly concludes that the expenditure of \$1,000.00 for repairing and making suitable the building which is to be purchased by the County School Board, is a necessary expense incident to providing office space for the County School Superintendent, then I am of the opinion that the expenditure would be authorized by law.

Instead of paying the \$1,000.00 in a lump sum to the County School Board, and thereby delegating its expenditure to that Board, I suggest that your Board directly arrange and pay for the work of repairing and making the building suitable for the school office. This would permit your Board to see that its funds were properly expended in that it would handle the letting of contracts and purchase of materials and the auditing and approval of bills for the cost of the work. It would also be necessary for your Board to comply with all the statutory requisites applicable in cases where funds under its control are appropriated and expended.

There may, of course, be sound factual reasons for your Board to decline to make the particular expenditure in question, but assuming the facts to be that office space for the County School Superintendent is actually needed and that the expenditure of \$1,000.00 is essential in order to provide such office space, then, in my opinion, because of the provisions of Section 230.29, it would not be an illegal expenditure, if your Board decides to make it.

As you state in your letter, it is not customary for this office to render opinions in matters of this kind. This opinion is unofficial and is rendered solely for whatever benefit it may afford in solving the problem confronting you and your county officials.

August 10, 1944.—044-238.

#### JOINT PETITION FOR REFERENDUM ELECTION

**QUESTION:** Is it necessary to secure the signature of the U. S. Forest Service as a landowner on a petition for a referendum election to determine if a county fire control unit shall be established?

*To Honorable H. J. Malsberger, State Forester, Florida Forest and Park Service:*

Section 125.29, Florida Statutes, 1941, Supplement to Vol. 1 (Section 3, Chapter 21997, Acts of 1943) provides that before a referendum election can be held to determine if a county fire control unit shall be established, the owners of the majority of the acreage in such county shall petition

the Board of County Commissioners for such election. You advise that in some counties, if a majority of the land is to be represented on the petition, it will be necessary that the U. S. Forest Service sign the petition as a landowner.

You request my opinion as to whether or not it is necessary to secure the signature of the U. S. Forest Service as a landowner on the petition since it does not pay direct taxes.

It is my opinion that it is unnecessary that the U. S. Forest Service sign the petition as a landowner. Section 125.26, Florida Statutes, 1941, Vol. 1, Supplement, provides that counties may levy a limited tax on the taxable property in the county to pay for fire control work. Under present laws the U. S. Forest Service will not be required to directly pay this special tax on its lands. Since it will not be required to pay this tax I do not believe it is necessary for it to sign the petition.

March 9, 1943.—043-67.

#### LEASE OF PROPERTY TO FEDERAL GOVERNMENT

**QUESTION:** Do the Boards of County Commissioners of the several counties of the State have power and authority to lease county owned real property other than airports to the Federal Government for War and Navy Department use?

*To Captain John E. Holliman, Corps of Engineers, Atlanta, Georgia:*

Section 5, Article VIII, Florida Constitution, provides that the "powers, duties and compensation of such county commissioners shall be prescribed by law." The Supreme Court of Florida, in the case of *Parker et al., County Commissioners vs. Evening News Publishing Company*, 54 Fla. 544, 45 So. 309, text 310, stated that "the powers and duties of county commissioners are purely statutory," and cited the above section of the State Constitution and the case of *Board of County Commissioners of Escambia County vs. Board of Pilot Commissioners of the Port of Pensacola*, 52 Fla. 197, 120 Am. St. Rep. 196, 42 So. 697 as their authority for such statement. Although the same Court in the case of *Martin vs. Townsend*, 32 Fla. 318, 13 So. 887 held that the County Commissioners of Hillsborough County had authority to sell the lands involved in that suit, an examination of that case reveals that the lands in question were a part of 160 acres of lands granted the county by the United States for county site purposes, by Act of July 25, 1848, which Act expressly provided that the **proceeds of the sale** of the lands granted were to be applied to the building of a courthouse, jail and other public buildings for such county. This Federal Act seems to contemplate a sale by the county. The case of *Weston vs. Moody*, 37 Fla. 473, 19 So. 880, involved similar lands granted to Marion county.

As to whether a county has power, under the general law in the absence of an express statute, to dispose of its property, there is a divergence of authority, some cases holding that it has such power and others holding that it has not (see 15 C. J. 537, Section 224; 20 C. J. S. 1003, Section 172.) A county has no power to lease its property to **private persons** in the absence of constitutional or statutory provision expressly or impliedly authorizing it to do so (14 Am. Jur. 208, Section 36.)

In the light of the expression by the Supreme Court of Florida, above mentioned, and the uncertainty of the general power of the county to lease or convey its property, I am of the opinion that we must look to the Statutes and Laws of Florida for any authority of County Commissioners to sell or lease real property to the Federal Government or to any person.

The enactment of Chapter 13622, Laws of Florida, Acts of 1929 (Section 694.11, Florida Statutes, 1941) validating deeds of conveyance of



lands by County Commissioners, prior to the year 1915, seems to be a construction by the Legislature of the want of authority to execute the deeds, otherwise there was no need of validation. A former Attorney General of Florida, on October 24, 1940, (1939-1940 Biennial Report 44) held that County Commissioners have no authority to sell and convey lands of the county, under the general statutory laws of this state.

Chapter 125, Florida Statutes, 1941, which relates to the general powers and duties of Boards of County Commissioners, contains no general power of sale of the County Commissioners over county property. Chapter 149, Florida Statutes, 1941, relating to county airports, gives the County Commissioners power to lease airports acquired by them under this chapter for periods of time not exceeding twenty years. However, this power appears to be limited to leases to "private parties." Section 331.04, Florida Statutes, 1941, empowers County Commissioners to acquire emergency landing fields and airports and authorizes them to convey the same to the State Road Department.

The Legislature of this state has from time to time granted power of sale over county property, to Boards of County Commissioners, by local acts. Chapter 12848, Laws of Florida, Acts of 1927, granting such a power to Hillsborough County is such an act. Whether or not there is a similar act for any particular county can best be answered by the County Attorney for that county.

Being of the opinion that the powers of the Boards of County Commissioners of the several counties of the State to sell and convey real estate, or to grant any interest therein by lease or otherwise, is purely statutory and finding no statute giving them general power of sale I must hold that such County Commissioners have no power and authority to lease county owned real property other than airports to the Federal Government for War and Navy Department use. I express no opinion as to the right to lease airports to the Federal Government, as such question is expressly excluded from your request.

February 15, 1944.—044-58.

#### POSTWAR PLANNING

**QUESTION:** May the Boards of County Commissioners of this state provide a reserve fund for the purpose of maintaining a postwar construction program?

*To Honorable Noah B. Butt, Attorney for the Board of County Commissioners,  
Brevard County, Florida:*

I do not find that the Legislature made express provision for county postwar planning as it did for municipalities by Chapter 21893, Laws of Florida, Acts of 1943. Notwithstanding, I think a Board of County Commissioners may, under the authority of existing laws, take the necessary legal steps to provide for a postwar construction program.

I refer you first to Section 129.05, Florida Statutes, 1941, which provides for the making of an annual budget by County Commissioners. The last sentence of this section reads as follows:

"All unexpended balances to the credit of any account at the end of the fiscal year shall revert to the fund from which the appropriation was made, but nothing herein shall be construed as prohibiting the reserving in the estimates a reasonable sum for contingencies and emergencies, and the appropriation of any part of said sum so reserved for any expense of the county authorized by law."

Chapter 21691, Laws of Florida, Acts of 1943, provides that Boards of County Commissioners may invest any surplus public county funds in

negotiable direct obligations of, or obligations the principal and interest of which are unconditionally guaranteed by the United States Government at the then prevailing market price for such securities. Such securities so purchased shall be properly earmarked and deposited in a safety deposit box in some bank and no withdrawal of such securities in whole or in part shall be made except upon authority of a resolution of the Board of County Commissioners. Sections 3 and 4 of said chapter read as follows:

"Section 3. When the money invested in such securities is needed in whole or in part for the purposes originally intended, the Board of County Commissioners of such county is authorized to sell such security or securities at the then prevailing market price and to pay the proceeds of such sale into the proper account or fund of the county.

"Section 4. For the purposes of this Act the term 'Surplus Funds' is defined as funds in any general or special account or fund of the county held or controlled by the County Commissioners of such county **which in reasonable contemplation will not be needed for the purposes intended within a period of six months from the date of such investment.**" (Emphasis supplied)

It is my opinion that a county may, in any fiscal year, budget and levy taxes for any authorized county purpose or purposes within tax millage ceiling limits, and may also estimate and earmark in its budget, out of its income derived from sources other than its ad valorem levies, amounts for such purpose or purposes. Should it develop after these revenues accrue or are accruing that the county will not be able to use them for the purposes contemplated within a period of six months, because of Federal restrictions on construction, such revenues may be determined to be surplus funds under Chapter 21691 and invested in negotiable direct obligations of, or obligations the principal and interest of which are unconditionally guaranteed by, the United States Government at the then prevailing market prices for such securities.

Annual tax levies and annual earmarking of other county income for current needs, spread over the years of the war period, and declaration of the resultant revenues as surplus if it develops the same cannot be used during current fiscal years, and investment of same under Chapter 21691, will build up reserves for postwar projects.

No one can foresee when the war will be over so no objections can be raised that provision is being made in a current budget for work which cannot be completed. Presumably the work budgeted will be commenced during the current budget year if the war ends that year and federal restrictions are removed.

The Commissioners should from year to year, while the war continues, show in their annual budgets any such accumulated securities, as being devoted to particular projects.

Of course, it is realized that such a postwar program is in nowise absolute and that the Board can order the sale of the securities prior to the postwar period and by legal transfer, use the proceeds derived for some other current budget need and defeat to that extent the postwar program, but that may be desirable since if the postwar program were absolutely tied down and were not dependent on being carried over from year to year it would be impossible for the funds represented by the investments to be used to meet any emergency requirements in the meantime or be devoted to some change in the postwar plan, which, after the passage of time might be found desirable.

I believe that if you will study these statutes, you will readily see that there is ample authority therein for you to implement your county postwar program, if the war continues long enough for your county to build up an investment reserve as permitted by the statute. Moreover, Chapter 21691, Laws of Florida, Acts of 1943 permits the County Commissioners to

aid in the war effort by the purchase of war bonds and at the same time earn investment interest on the invested funds and thereby augment the revenues of the county to be used for postwar work.

June 26, 1944.—044-200.

#### PURCHASE OF AUTOMOBILES FOR OFFICIAL USE

**QUESTION:** Are County Commissioners authorized to purchase automobiles for individual use in inspecting county roads and bridges and discharging other official duties, in the absence of legislative authority expressly authorizing such purchase?

*To Honorable G. B. Knowles, Attorney for the Board of County Commissioners, Manatee County, Bradenton, Florida:*

It seems that the Fifth County Commissioner's District of Manatee County comprises about two-fifths of the area of the county, with many county roads and bridges to be inspected and maintained by the Commissioner. Said Commissioner has requested the County Board to authorize him to purchase a second-hand automobile and pay for it with District Road and Bridge Funds, with the understanding that the title would be vested in the County, and the car would be used by the Commissioner in doing his official work for the District.

It appears that this was done in two of the districts. In one district a car was furnished to the Commissioner for his official duties, and in another a car was furnished to his Road Supervisor for his official duties, and the cost of the car and the operations thereof, in each case, was paid by the District Road and Bridge Fund.

Inasmuch as the Legislature has, either by Section 125.16, Florida Statutes, 1941, or by special acts, provided per diem or other compensation and mileage allowances for County Commissioners, but has enacted no general law expressly authorizing the purchase of automobiles for the individual use of County Commissioners in the inspection of county roads and bridges and for the discharge of their other official duties, it is my opinion that such purchase is not authorized by law unless there exists a special law applicable to your county expressly authorizing such purchase, it being intended that the per diem or other compensation and mileage allowed County Commissioners should cover compensation and official traveling expenses.

As you are aware, the rule is that County Commissioners can exercise only such authority as is prescribed by law, and, where there is doubt as to the existence of authority, it should not be assumed. *Hopkins v. Special Road and Bridge District No. 4 in Brevard County*, 73 Fla. 247, 74. So. 310.

July 12, 1944.—044-198.

#### REHABILITATION OF VETERANS—EMPLOYMENT OF OFFICERS

**QUESTION:** Have the County Commissioners of Pinellas County the authority to make an appropriation in their budget for the coming year to pay the salaries of two County Service Officers whose duty it would be to assist in rehabilitating returning veterans in every possible way, including employment service, preparation of government forms, giving advice as to their rights under Federal Laws, etc.?

*To Honorable Bryan Willis, State Auditor:*

Article VIII, Section 5, of the State Constitution provides that: "... the powers, duties and compensation of such county commissioners shall be prescribed by law. . . ."

Article XIII, Section 3, of the Constitution, in part reads as follows:

"The respective counties of the state shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society."

It may be conceded that the words "may have claims upon the aid and sympathy of society" are broad enough to cover such aid as is proposed, but the quoted section of the Constitution is not self-executing; it requires action by the Legislature to put it into effect.

The Legislature has set out in general terms the powers and duties of the County Commissioners in Section 125.01, Florida Statutes, 1941. Subsection 4 of Section 125.01 authorizes the County Commissioners "to have care and provide for the poor and indigent people of the county." As used in the statute the words "poor" and "indigent" are synonymous and refer to persons who require public charity. This subsection is the only statute authorizing anything in the nature of aid or assistance to those who "may have claims upon the aid and sympathy of society."

Our Supreme Court has held repeatedly that while the Boards of County Commissioners are constitutional officers, their powers and duties are required to be fixed by statute, and they have only such powers and duties as are conferred by Statute. *Bowden vs. Ricker* 70 Fla. 154, 69 So. 694; *State vs. Culbreath*, 128 Fla. 210, 174 So. 422; *Stephens vs. Futch*, 73 Fla. 708, 74 So. 805.

Our Court has also held that where there is doubt as to the existence of authority in the County Commissioners, it should not be assumed. *Hopkins vs. Special Road, etc.*, Dist., 73 Fla. 247, 74 So. 310; *White vs. Crandon*, 116 So. 162, 156 So. 303.

The plan proposed goes far beyond aid to the poor and indigent. The beneficiaries of the proposed plan might or might not be poor and indigent. The proposed plan is not confined to the aid of such persons; and the statute, in my opinion, is not broad enough to authorize the County Commissioners to make an appropriation in their budget for that purpose.

Until the Legislature authorizes such action, expenditure of county funds for the purposes contemplated would, in my opinion, be unlawful.

## COUNTY BUDGETS

August 23, 1943.—043-230.

### AUTHORITY OF COUNTY COMMISSIONERS TO TRANSFER FUNDS

QUESTION: Escambia County has always received approximately \$33,000.00 from the Race Track Fund. This money was placed by the Budget Commission, and approved by the Board of County Commissioners, in the Fine and Forfeiture Fund for the fiscal year 1942-43, which ends September 30, 1943. The 1943 Legislature passed the Cigarette Tax Bill (Number 312) and the succeeding bill, Number 313, said Bill stating that said funds are to supplement the Race Track Funds to avoid any shortage being experienced from the lack of such funds. Our Board of County Commissioners placed the Cigarette Tax first in the Fine and Forfeiture Fund and then transferred the same to the Road and Bridge Fund. May this money be transferred to any fund other than the one to which it was allocated and, in the event it can be transferred, may it be expended for articles and works not budgeted in the 1942-43 budget?

*To Honorable Bryan Willis, State Auditor:*

I wish to advise that apparently the question propounded is answered by Section 129.03, Florida Statutes, 1941, which provides:

"It is unlawful to transfer the money or any part thereof of one fund to another fund, or to pay from one fund the expenditures



legally payable from another fund, except by resolution of the board of county commissioners, which said resolution must be approved by the state comptroller. In case of any question arising as to the proper fund from which any expenditure should be paid, the decision of the state comptroller shall govern; provided, that this section shall not apply to any moneys, or part thereof, which may be allotted, distributed, transferred or paid under the provisions of any law providing for the apportioning and distribution among the several counties of this state of the moneys derived from licensing and taxing racing, or the use of said moneys by or in said counties, or any law amendatory, supplementary, or in lieu thereof." (Emphasis supplied).

because the Act referred to, being Bill 313, Chapter 21947 (which this office previously held applicable in the distribution of money to the counties) makes no change in the manner in which the money distributed under said Bill is allocated to the counties but provides that it shall go to

"... The Board of County Commissioners, the County Board of Public Instruction of each County of the State of Florida, or to such other authority as is authorized by law to receive the same, as now or hereafter provided by law for the apportionment of Racing Commission Funds. ..."

In view of what I have said the answer to your first question is that the Board of County Commissioners may transfer this money from any fund it so desires to any other fund, provided such fund has been set up in the budget.

What I have said also answers your second question, i. e.: Can the money be transferred and expended for articles and work not budgeted in the 1942-43 budget? I stated that the money could be transferred to some fund that had been set up in the budget. The reason I take this position is because Chapter 15934, Acts of 1933, and Chapter 16886, Acts of 1935, being the budgetary acts applicable to Escambia County, specifically provide that all money must be budgeted and when so budgeted cannot be expended for any other purpose. Transfers may be made under certain conditions and I believe that with regard to money received in lieu of race track money Section 129.03 controls as I have heretofore pointed out.

July 24, 1943.—043-182.

#### BUDGET COMMISSION—POWER TO FIX BUDGETS; COUNTY BOARDS

QUESTION: Has the Duval County Budget Commission power to fix and finally determine the budgets of the various Boards under Chapters 22270, a Special Act, and 22079, a General Act?

To Honorable J. M. Lee, State Comptroller:

In reply I wish to advise that I have examined these two acts, and I am of the opinion that the question to be considered is whether or not Chapter 22270, a Special Act, was repealed by Chapter 22079, a General Act, and I am of the opinion that the Special Act was not repealed by the General Act. This seems to have been the holding of the Supreme Court in all of the cases that have come before it to date.

A compilation of these cases is contained in Florida Digest, "Statutes," Key No. 162:

The maxim, "*Leges Posteriores priores contrarias abrogant*" is not applicable when the subsequent act is general and the prior act special and particular. Fla. 1853. *Luke v. State*, 5 Fla. 185.

A more recent case is that of *State v. Sanders*, 85 So. 333, where the Court said:

"Where a special or local law and a later general law are merely inconsistent, and the general law does not in some express terms repeal or supersede the local law, the latter will prevail in its proper sphere of operation, unless an intent to repeal or supersede it appears in the general law."

Also one of the latest cases is that of *American Bakeries Co., vs. Haines City*, 180 So. 524.

I do not find any express intent in the General Act to repeal or supersede the Special Act. The Special Act is applicable to the powers of the Duval County Budget Commission, and the Budget Commission is given more power and authority than the Budget Commission would have had under the General Act: to wit, Chapter 22079. As I have said before I am of the opinion that the Special Act prevails.

October 6, 1943.—043-262.

#### EXPENDITURE—INCREASE; APPROVAL

**QUESTION:** In view of Section 24 of Chapter 22079, Acts of 1943, is it necessary that a budget for the Board of County Commissioners be referred to the State Budget Board for approval in a case where there is an increase in expenditures of more than 5 per cent which the County Commissioners have been able to absorb from income other than taxes to be levied upon the current roll, the County Commissioners levying the same amount of millage in 1943 for maintenance purposes as was levied in 1942?

*To Honorable J. M. Lee, State Comptroller:*

After minutely examining Section 24 of Chapter 22079, Acts of 1943, the legislation in question, I beg leave to state that it is my opinion that whenever the budget for operating expenses shall exceed 5 per cent, it is necessary that such budget be referred to the State Budget Board for approval.

#### COUNTY DEPOSITORIES

November 1, 1943.—043-291.

#### SECURITY FOR COUNTY FUNDS—TAX ANTICIPATION CERTIFICATES

**QUESTION:** Are tax anticipation certificates issued by the State Board of Administration for the various counties acceptable as security for county funds under Sections 136.01 and 136.02, Florida Statutes, 1941?

*To Honorable J. M. Lee, State Comptroller:*

The applicable language of Section 136.01, Florida Statutes, 1941, is as follows:

"The funds hereinabove referred to shall include: County general revenue funds, county fine and forfeiture funds, county road funds, and each and every other separate and distinct county fund, respectively; and shall also include the general or common county school fund and special tax school district funds, the enumeration of said funds being herein made, not by way of limitation, but of illustration, and it being the intent hereof that all funds of such county or of any district or subdivision thereof, shall be included."

The applicable language of Section 136.02, Florida Statutes, 1941, is as follows:

"United States bonds, bonds the payment of whose principal and interest is guaranteed by the United States, federal certificates of indebtedness, state, county or municipal bonds,"

It is my opinion that tax anticipation certificates are not, under these sections of the statute, acceptable as securities for county funds; this because of the fact that the securities mentioned are all securities in which a definite pledge of credit is made; whereas, tax anticipation certificates issued by the Board of Administration are payable out of, and only out of, the distributive share of the particular county of gasoline or other fuel tax funds accruing to the account of the county, under the terms of Section 16, Article IX of the Constitution of the State of Florida, which makes them a security of limited scope payable out of a particular fund and subject to the accrual of the fund, and a security other than and different from the securities described in Sections 136.01 and 136.02, Florida Statutes, 1941.

In this connection it occurs to me to call to your attention the form of the securities set forth in the Jefferson County resolution, a copy of which was delivered to me by your office, as aforesaid.

The promise to pay contained in this section appears to be absolute and the security is mentioned only incidentally as a security of the payment of what in terms appears to be an absolute promise to pay, whereas the only authorized certificate is one payable out of a specific fund and subject to the accrual of the fund as aforesaid.

December 1, 1944.—044-335.

#### TAX COLLECTOR—DEPOSIT OF COUNTY FUNDS

**QUESTION:** Would a Tax Collector be within his legal rights in depositing moneys in a bank or banks elsewhere than in his own county, requiring said bank or banks to secure said account or accounts in full, with or without a resolution by the Board of County Commissioners designating such bank or banks as depositories?

*To Honorable E. B. Wilson, Tax Collector, Madison County, Madison, Florida:*

In reply to the foregoing question, I beg leave to state that you yourself have no power to select the depositories in which public funds coming to you by virtue of your office as Tax Collector are to be deposited. The selection and qualification of County Depositories are prescribed by Sections 136.01 and 136.02, Florida Statutes, 1941.

In the last mentioned section the situation described in your inquiry is dealt with as follows:

"But in case no bank within the County should qualify then said Boards shall divide such depositories among the banks in some other County or Counties which comply with the conditions as to security provided in this section and §136.01."

From the foregoing quotation it follows that the matter of dealing with such a situation is a duty of the Board of County Commissioners and the Board of Public Instruction depending upon whether the funds are general or school funds.

I trust that this will prove an adequate reply to your question.

#### BONDS OF COUNTY OFFICERS

November 28, 1944.—044-330.

#### COMMISSIONERS: BONDS—PERIOD OF EXTENSION

**QUESTION:** Under the Constitutional Amendment ratified at the recent general election relating to tenure of office of County Commissioners, for what periods should the County Commissioners' commissions and official bonds extend?

*To Honorable P. B. Revels, County Attorney, Putnam County  
Palatka, Florida:*

The Amendment provides in part:

"Provided, that the County Commissioners elected from the even numbered districts in 1944 shall serve for two years, those elected in 1944 from the odd numbered districts shall serve for four years, and thereafter the terms shall be for four years";

It follows that the commissions and bonds of the Commissioners from the even numbered districts should be for two years extending from the first Tuesday after the first Monday of January next, while the commissions and bonds of the Commissioners of the odd numbered districts should be for four years extending from the first Tuesday after the first Monday in January next. After the expiration of such terms commissions and bonds shall be for four year terms for all Commissioners.

This is an unofficial opinion.

### FINE AND FORFEITURE FUND

January 22, 1943.—043-28.

#### COST BILLS—REQUIRED CONTENTS

QUESTION: How far can the County Commissioners go in insisting upon information from county officers and what information can the County Commissioners require the officers to place upon their cost bills submitted to the county for auditing and payment by the Board of County Commissioners?

*To Honorable Bryan Willis, State Auditor:*

Section 142.10, Florida Statutes, 1941, reads as follows:

"The officer shall make out his account against the county in such form as the county commissioners may require, stating the services for which the fee is charged, the title of the case in which the services were performed, and the facts which, under the provisions of Section 142.09, make the fees a good claim against the county, including all legal charges and costs before justices of the peace, and present the same to the board of county commissioners, with the affidavit that the same is correct."

This section appears to fix the requirements for cost bills.

The legality of any fee charged by an officer against the county is a question of fact which can only be determined from the original records themselves and/or extrinsic facts without the records, and it would be impossible for any form of cost bill to contain sufficient data to conclusively determine the legality of any item of cost. An attempt to prescribe required contents of a cost bill sufficient to accomplish this purpose would be so extensive in its ramifications as to make it impracticable and this would also apply to an attempt to prescribe a cost bill form containing such information, as such data would embrace practically everything contained in the records and additional matters outside the records, supported by proof.

It appears to me that if Section 142.10, supra, is followed in prescribing the contents of cost bills, such cost bills will contain sufficient information to direct the attention of the Board of County Commissioners to any matter contained in the record for their inspection, and from which they can make inquiry as to the legality of any item of cost, without the record, if they so desire. It further appears that the question involved is one to be solved only by the Board of County Commissioners auditing cost bills against the original records and making such inquiries outside of the record as they see fit, and not by requiring cost bills to contain the voluminous amount of data



necessary to make them self-proving, if such were possible. However, the language of this section, as you will note, authorizes the County Commissioners to require the officer to make out his account against the county in such form as the County Commissioners may require, which provision leaves a broad discretion in the County Commissioners as to the contents of the form.

I am therefore of the opinion that it is not practical or possible to outline in methodical detail each and every step an officer must take in submitting his cost bill to the county, in order to enable him to claim the fees which he may be entitled to under the law, and that such cost bill should be in accordance with the provisions of Section 142.10, supra.

### COUNTY TRAFFIC OFFICERS

January 13, 1943.—043-14.

#### DUTIES AND FEES

QUESTION: 1. Is the Sheriff entitled to the fees and mileage provided by law for services performed by a county traffic officer in making an arrest and serving criminal process?

2. Where a county traffic officer or Deputy Sheriff apprehends a person for violation of a traffic law and gives such person a written unofficial notice (ticket) to appear in Court, and such person subsequently appears in Court without a warrant or summons to appear having been served upon him, should the Sheriff's mileage for making the arrest be taxed as cost against the defendant?

3. Where a county traffic officer or Deputy Sheriff apprehends a person for a violation of a traffic law and gives him a written unofficial notice (ticket) to appear in Court and subsequently has a summons to appear or warrant issued for such person on this charge and serves it on him before he appears in Court, should the Sheriff's fees and mileage for serving such process be taxed as cost against the defendant?

4. Where a person is charged with a criminal offense by affidavit made before a committing magistrate who does not have jurisdiction to try such offense, can the committing magistrate tax and collect cost from the defendant upon dismissing the case and discharging the defendant?

*To Honorable Luther W. Cobbey, County Attorney, Hillsborough County, Tampa, Florida:*

1. Chapter 18396, Acts of 1937, provides for county traffic officers, their duties and compensation in all counties of the state having a population of more than 100,000, which is applicable to Hillsborough County, and this act is almost identical to Chapter 146, Florida Statutes, 1941.

Section 2 of Chapter 18396, supra, fixes the salary of such county traffic officers and provides that the same shall be paid by the Board of County Commissioners out of the Fine and Forfeiture Fund of the county, and Section 7 provides that such compensation shall be the only compensation such traffic officer shall be entitled to receive from any source. Section 3 provides that the Board of County Commissioners shall furnish the necessary equipment and pay the actual expenses of such county traffic officer out of the Fine and Forfeiture Fund of the county. Section 4 provides that such county traffic officer shall have the same powers of arrest and service of criminal process as the Sheriff, and shall be allowed for making arrests and service of criminal process the same fees as the Sheriff and the same mileage for conveying prisoners, to be taxed as cost in case of conviction, and to be paid into the Fine and Forfeiture Fund of the county.

The conflict between Sections 2 and 7, fixing the salary of county traffic officers and limiting their compensation to such salary, and Sec-

tion 4, providing that they shall be allowed the same fees as the Sheriff for making arrest and serving criminal process, is reconciled by the further provision of Section 4 that all such cost shall be paid into the Fine and Forfeiture Fund of the county. The intent clearly appears that the Sheriff is not entitled to any fees whatsoever for services performed by a county traffic officer, and to allow him such fees would amount to double payment for such services, as the county pays the salary and expense of county traffic officers. The fees provided by this act should be collected from the defendant upon conviction, if possible, and paid into the Fine and Forfeiture Fund of the county, and where such fees are not collected from the defendant, they certainly would not be collectible from the county by the Sheriff.

2. Section 30.27, Florida Statutes, 1941, reads as follows:

"No sheriff, constable or coroner, shall charge constructive mileage. The mileage charged must be actually traveled by the nearest and most direct route by the public highway."

The intent of this law is clear and in order to charge mileage the mileage must be actually traveled by the officer. In view of the fact that a county traffic officer derives his authority by virtue of being commissioned as a Deputy Sheriff, this provision is also applicable to county traffic officers.

3. There is no provision of law for a county traffic officer giving a ticket to a person apprehended for the commission of an offense, and if the committing magistrate subsequently issues a warrant under Section 901.02, Florida Statutes, 1941, or a summons to appear under Section 901.09, Florida Statutes, 1941, for such person, the county traffic officer is authorized to serve it on him, and upon conviction his mileage and fee would be a legal cost taxable against the defendant. The mere giving a person such ticket and/or instructing him to appear in Court does not constitute an arrest. If, however, a person is actually arrested by the officer when apprehended, it is the duty of the officer to take him without unnecessary delay before a magistrate and no warrant or summons to appear is necessary, and the officer has no authority to release him from such custody on his own recognizance.

4. Section 14, Declaration of Rights of the Constitution of the State of Florida, reads as follows:

"No person shall be compelled to pay costs except after conviction, on a final trial."

Section 939.02, Florida Statutes, 1941, reads as follows:

"All costs accruing before a committing magistrate shall be taxed against the defendant on conviction or estreat of recognizance."

Section 939.06, Florida Statutes, 1941, reads as follows:

"No defendant in a criminal prosecution who is acquitted or discharged shall be liable for any cost or fees of the court or any ministerial office, or for any charge for subsistence while retained in custody. If he shall have paid any taxable cost in the case, the clerk or justice shall give him a certificate of the payment of such cost, with the items thereof, which, when audited and approved according to law, shall be refunded to him by the county."

The Constitution of this State expressly prohibits the taxation of cost in criminal cases against the defendant, unless he has been convicted on a final trial, and there is no provision in the constitution or the statutes providing for the payment of cost by the defendant in a criminal case where the defendant is discharged by a committing magistrate upon the case being dismissed or for any other reason, and where such cost has been collected from the defendant, under the provisions of Section 939.06, Florida Statutes, 1941, he may collect the same from the county.

I am therefore of the opinion that: (1) The Sheriff is not entitled to fees and mileage for services performed by county traffic officers in criminal cases, that such fees and mileage are taxable against the defendant where he has plead guilty or has been convicted on a final trial or his bond estreated, and such cost should be collected from the defendant and paid into the Fine and Forfeiture Fund of the county; (2) that no county traffic officer, or Deputy Sheriff is entitled to collect any mileage for serving criminal process from the county or the defendant, unless such mileage is actually traveled by such officer by the nearest and most direct route by the public highway; (3) that where a county traffic officer or Deputy Sheriff gives a person a ticket for a violation of a traffic law, he may subsequently serve a warrant or summons to appear upon such person and the mileage and fees for serving same should be taxed as cost against the defendant upon plea of guilty or conviction on final trial; (4) that a committing magistrate having no trial jurisdiction cannot tax cost against the defendant or collect such cost whether the defendant is bound over or discharged, for the reason that cost can only be taxed against the defendant after a plea of guilty or conviction on final trial by a court having jurisdiction to try the case, and further that no court having jurisdiction to try a criminal case can tax and collect cost against the defendant upon the defendant being discharged by reason of the case being nolle prossed or dismissed.

### COUNTY HOSPITALS

August 3, 1944.—044-223.

#### JACKSON COUNTY HOSPITAL CORPORATION—POWERS

QUESTION: 1. Does the Jackson County Hospital Corporation, created under Chapter 19901, Laws of Florida, Special Acts of 1939, have authority to mortgage the property?

2. Does it have authority to issue bonds?

3. If bonds may be issued does the Board of County Commissioners have authority to levy a millage to retire the bonds?

*To Honorable Doc Grant, Clerk of the Circuit Court, Jackson County, Marianna, Florida:*

1. It is my unofficial opinion that the Hospital Corporation does not have authority under said Chapter to mortgage its real and personal property. I doubt that this property, which is public property, could be mortgaged without the approval of a majority vote of the free-holders of the county. See *Brash v. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827. *State v. Calhoun* (Fla.) 169 So. 673; 170 So. 883.

2. There is no authority in Chapter 19901 to issue any bonds supported by ad valorem levies. Under Section 11 of said chapter, contracts may be made pledging the anticipated revenues to be received by the Hospital Corporation during the first year of the corporation's existence. This authority given in Section 11 appears to be the only authority for the issuance of certificates of indebtedness of the class contemplated in *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39 and *Posey v. Wakulla County* (Fla.), 3 So. 2nd, 799, and then only for the anticipated revenues for the first year's existence of the corporation.

There appears to be no authority in the Act for the issuance of revenue bonds or debentures payable solely from the income derived from the operation of the hospital.

3. Inasmuch as it is my opinion that there is no authority for the issuance of bonds, it is not necessary to answer the third question.

I do not undertake to pass on the constitutionality of the Act, but only to answer by an unofficial opinion the questions submitted.

## SPECIAL STATE CENSUS

August 7, 1943.—043-193.

## PALM BEACH AND BROWARD COUNTIES

**QUESTION:** What is the effect on certain existing laws containing population classifications, by reason of the taking of a special census for Palm Beach and Broward Counties as provided by Chapter 22205, Laws of Florida, Acts of 1943?

*To Honorable Henry F. Lilienthal, County Attorney, Palm Beach County,  
West Palm Beach, Florida:*

Chapter 22205, Acts of 1943, purports to provide for a "State Census" in Palm Beach and Broward Counties and such census is required to be made by the Commissioner of Agriculture.

It is clear that if the census taken under Chapter 22205 is a "State" Census within the intentment of Section 5, Article VII, of the State Constitution then all valid existing population classification laws would, at least insofar as Palm Beach and Broward Counties are concerned, be susceptible to new application under the new census figures, and some of such laws might thereby be brought into operation in one or the other of these counties, and other of such laws might cease to operate in one or the other of these counties, depending upon the new census figures and the population figures prescribed in such laws. This is so because the Supreme Court has held that laws providing for county population classifications "according to the last preceding State or Federal Census" operate progressively to eliminate or include counties from the operation of such laws as a new State or Federal Census is taken, *State v. Daniel*, 87 Fla. 270, 99 So. 804.

Chapter 21637, Laws of Florida, Acts of 1943, is in *pari materia* with Chapter 22205, and provides for a Circuit Judge for the Fifteenth Judicial Circuit of Florida, comprising Palm Beach and Broward Counties, for each fifty thousand inhabitants or major fraction thereof.

It is not necessary in this opinion to pass upon the question of whether the above two chapters accord with Section 45, Article V, and Section 5, Article VII of the State Constitution, relating to the number and population of Judicial Circuits and the number of Circuit Judges to be appointed in each Circuit, and for the enumeration of the inhabitants of the State, respectively. Moreover, it is entirely possible that a special census may be provided for by the Legislature to serve a particular state purpose other than the regular state-wide census. Section 45(c) of Article V relating to the number of Circuit Judges in an established Judicial Circuit does not expressly require that the ascertainment of the population in the Circuit be made at the "last preceding State or Federal Census."

The foregoing considered, it is my opinion that the "last preceding State Census" referred to in Chapter 20663, Laws of Florida, Acts of 1941, and similar laws with population classification brackets, means the regular enumeration of all the inhabitants of the State by counties every decade beginning with 1895 as provided by said Section 5, Article VII, and that such references in Chapter 20663 and in similar acts were not made to or in contemplation of, the special census for Palm Beach and Broward Counties, provided for in Chapter 22205. The classification according to population intended by Chapter 20663 and similar acts, in order to be a valid one, must have some reasonable basis and some fair degree of uniformity and necessarily refers to a census of the population of the entire State by counties taken at the same time and not to a special census of only two counties, which special census for the purpose of valid statutory classification does not take into consideration increase or decrease of population in other counties where the special census is not taken.



## CHAPTER IX

### CITIES AND TOWNS

#### CONTRACTION AND EXTENSION OF TERRITORIAL LIMITS

June 28, 1944.—044-211.

#### CORPORATE LIMITS FIXED BY SPECIAL ACT

**QUESTION:** May the corporate limits of a municipality, fixed by a special act of the Legislature, be extended under either Section 171.04, or 171.05, Florida Statutes, 1941, where said sections are merely referred to in another special act?

*To Mr. Dewey B. Hooten, Executive Secretary, State Planning Board:*

It is recited in the preamble to Chapter 3629, Laws of Florida, 1885, that the Town of Ocala, Florida, was incorporated and reorganized under the provisions of a general law providing for the incorporation of cities and towns and that under such incorporation the limits of said municipality were fixed; that the records of such incorporated and reorganized city were lost, and that there were some doubts as to the legality of such incorporation "and of the extent of its corporate limits." Such chapter declared said municipality to be legally incorporated and reorganized, and established the corporate limits thereof. Since the last mentioned act such municipality has become by statute the City of Ocala, and its corporate limits have been enlarged and defined by legislative enactment under Chapter 4089, Laws of Florida, 1891, Chapters 6736 and 6737, Special Acts, 1913, and under Chapter 7676 Special Acts, 1917.

The Town of Homestead, Florida, was originally organized under the general laws of Florida providing for the incorporation of municipalities, but that government was subsequently abolished and the City of Homestead and its boundaries established by a special act of the Legislature. Later a new City of Homestead was established and its territorial limits defined by metes and bounds under a special act of the Legislature. Thereafter, that municipality, acting under a general law for the incorporation of municipalities (now Section 171.04, Florida Statutes, 1941), endeavored by ordinance to enlarge its corporate limits, but such enlargement was challenged. In adjudicating this challenge, the Supreme Court of Florida in *State vs. City of Homestead*, 130 So. 28, held that the attempted enlargement was ineffectual under the general laws since those laws are operative only where a municipality is organized and its territorial limits are designated by voluntary action of its citizens or by prescribed nonlegislative action, and that where boundaries have been fixed by a statute, even though they were originally designated by voluntary action of citizens in organizing the municipality under the statute providing for a uniform system of government, such boundaries cannot be legally extended by municipal ordinance or otherwise than by statute, for that would give the ordinance or other nonlegislative action the force and effect of repealing or amending a statute, which is not permitted by the Legislative Article of the Constitution; that where the jurisdiction and boundaries of a municipality are fixed by a statute they may be extended at any time by statute but not otherwise as the law now is. This position of our Supreme Court was reaffirmed in *Klich vs. Miami Land & Development Co.* 191 So. 41.

In view of the aforesaid decisions of our Supreme Court, it is my opinion that such right as the City of Ocala now possesses to extend its corporate limits is derived from the aforesaid special act. Such act includes a paragraph containing a reference to the general law for the extension of municipal boundaries, and it may be that such reference would be so construed as to give the city the privilege of proceeding under the general law. On the other hand, it might be held that the paragraph in question, when considered with the entire act and the title thereof, contains a bare reference to, and not a grant of power to proceed under, the general law.

Therefore, there would appear to be some doubt as to whether such act authorizes the city to follow the general law in extending its limits.

## CHAPTER X

### TAXATION AND FINANCE

#### GENERAL TAXATION PROVISIONS

May 17, 1944.—044-150.

##### ACTION TO REMOVE RESTRICTIONS ON LOTS

**QUESTION:** May the State of Florida be sued in an action to remove restrictions on lots in boomtime subdivisions?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

The restrictions set out in Section 192.33, Florida Statutes, 1941, are not eliminated by tax deed or the foreclosure of a tax lien. Such statute applies to lands forfeited to the State under the Murphy Act.

I am informed that the lots in question were acquired by the State of Florida under Chapter 18296, Laws of Florida, 1937. Consequently the State of Florida cannot be made a party to such a suit without the express consent of the Legislature. There has been no such consent given. See *Prince-Hall vs. City of Jacksonville*, 6 So. 2d. 250.

It is therefore my opinion that neither the State of Florida nor Trustees of the Internal Improvement Fund may be made parties to a suit to have restrictions removed, brought by any individual, relating to lots in a boomtime subdivision where the interest of the State is in lands obtained under the Murphy Act. To remove the restrictions on such lands or if it is necessary to make the owners of such lands parties to a suit to remove restrictions on other lands, it will be necessary that the State's title in these lands be held by some person who may be made a party to the suit.

March 1, 1943.—043-56.

##### COLLEGE FRATERNITY HOUSES—EXEMPTION

**QUESTION:** Would college fraternity houses at the University of Florida continue to be exempt from taxation in the event they should be leased to the State Board of Control temporarily to be used as dormitories for housing members of the armed forces in training at the University?

*To Honorable Spessard L. Holland, Governor:*

It is my opinion that such fraternity houses under the circumstances would continue to be exempt from taxation under Paragraph (8), Section 192.06, Florida Statutes, 1941, which, among other things, provides that all property in the State now owned and exclusively used by the duly constituted chapters chartered by national college fraternities at colleges and universities in the State of Florida, used solely as club houses or homes, shall be exempt from all taxation.

The emergency which exists at present, and which necessitates the leasing of these fraternity houses by the State Board of Control for the purpose indicated, would not, in my opinion, be sufficient to deprive such property of its fundamental uses and purposes to such an extent as to render it liable for taxation during such emergency period. However, I call your attention to the fact that, inasmuch as the State no longer participates in ad valorem taxes, the problem here presented is a matter in which the counties where the property is located are peculiarly interested, and which should be considered by local county taxing authorities.

Even if there were any question concerning the liability of such property for taxation when leased to the State Board of Control, the question of tax liability could be settled, I think, by providing in the lease that the lessee should pay any taxes lawfully levied against such property, and, upon assuming such obligation the Board of Control as lessee would probably be exempt from such taxation on the ground that the property was being used for educational purposes.

May 4, 1943.—043-110.

#### EVERGLADES DRAINAGE DISTRICT TAX LIENS

QUESTION: 1. Is the lien of the Everglades Drainage District for its assessments superior, on a parity with, or inferior to the lien of the City of Coral Gables, Florida, for general taxes assessed by it?

2. Did Section 15, Chapter 20658, Acts of 1941, eliminate or wipe out the tax liens for municipal taxes when title became vested thereunder in the Everglades Drainage District?

3. Is municipally owned property subject to Everglades Drainage District assessments?

*To Honorable Edward L. Semple, City Attorney, City of Coral Gables, Miami, Florida:*

1. Assuming that the municipal tax referred to is a general tax as distinguished from municipal special assessments, the statute to be considered is Section 192.21, Florida Statutes, 1941, compiled from Section 1, Chapter 10040, Laws of Florida, 1925; Section 1, Chapter 14572, Laws of Florida 1929; Sections 2, 2½, Chapter 17442, Laws of Florida, 1935, and Section 1, Chapter 20722, Laws of Florida, 1941, providing:

"All taxes imposed pursuant to the constitution and laws of this State shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment. . . ."

Under this section of the statutes, liens for general taxes levied by municipalities are made of equal dignity with state and county tax liens. See *Bice v. Haines City*, 142, Florida, 371, 195 So. 919.

Section 10, Chapter 20658, Laws of Florida, 1941, relating to the Everglades Drainage District, provides:

"The acreage and ad valorem taxes levied or authorized to be levied by this Act shall constitute a lien upon the lands so assessed as of the first day of January of each year in which the tax roll is delivered to the tax collector, which lien shall be superior in dignity to all liens upon said lands and equal in dignity to the lien for State and County taxes upon said lands." (Emphasis supplied).

Practically the same language appeared in Section 51, Laws of Florida, 1931, which was not changed by Chapter 17902, Laws of Florida, 1937. However, Section 51 was repealed by Section 6, Chapter 20658, Laws of Florida, 1941. Therefore, we have, by the provisions of the statutes relating to the Everglades Drainage District, a drainage lien superior to all liens save those of state and county tax liens, and by general statutes, liens of municipalities for general taxes are of equal dignity with state and county tax liens. Although these laws have been re-enacted several times, there is nothing to indicate any repeal one of the other and they therefore must be read one in connection with the other. Applying such rule of statutory construction, my opinion is that liens of state and county, Everglades Drainage acreage and ad valorem taxes and taxes of municipalities of a general nature are all of equal dignity.

2. With such construction of these various statutes fixing the equality of the liens of the said taxing units, it is my opinion that Section 15 (i)



of Chapter 20658, providing for vesting of title of certain lands in the Board of Commissioners of the Everglades Drainage District, does not eliminate or foreclose liens of taxes of state and counties nor the liens of taxes of municipalities where levy is for taxes of general nature, as distinguished from special assessments. See *Bice v. Haines City*, (supra), *Lake Worth v. McLeod*, 151 So. 318, *Sanford v. Dial* 142 So. 233.

3. Article IX, Section 1, providing that the Legislature may exempt from taxation property owned for municipal purpose, has reference to ad valorem taxes (*Miami Beach College Corp. v. Tomlinson*, 196 So. 608) and Section 192.06 (2), Florida Statutes, 1941, has no reference to levies for special assessments.

It is settled that the Legislature may levy reasonable special ad valorem taxes on land, and Section 1, Article IX of the Constitution is not applicable. *Martin v. Dade Muck Land Co.*, 116 So. 449.

Under our system of county and municipal government, special assessments will not be held to extend to property owned by governmental agencies and used for public purposes unless an intent to include such property clearly appears from the statute authorizing the levy. See *Edwards vs. City of Ocala*, 50 So. 421, *Alachua County vs. City of Gainesville*, 65 So. 653. Applying such rule, it is my opinion that the statute authorizing the levy of Everglades Drainage taxes does not authorize the levy or collection of Everglades Drainage District tax on property owned by a municipality and used for a public purpose. Property of the municipality not used for for a public purpose is subject to such tax.

Even if the statute could be construed to authorize a levy on property owned by a municipality and used for public purposes it is my opinion that no enforcement of such tax may be had as against such property. See *Blake vs. City of Tampa*, 156 So. 97.

August 15, 1944.—044-241.

#### HOMESTEAD EXEMPTION—ANNUAL CLAIMS

QUESTION: Are widows, war veterans, crippled and blind people required to file annual claims for homestead exemption?

*To Honorable G. W. Watts, Tax Assessor, Washington County, Chipley, Florida:*

Apparently your inquiry relates to Chapter 21876, Acts of 1943, the contents of which are self-explanatory, and to the effect that it shall be the duty of each taxpayer who claims said exemption to file one of said forms properly filled out and executed with the Assessor on or before April 1st of each year, and that failure so to do will constitute a waiver of said exemption for such year.

This language was brought forward from the prior act (Section 192.16, Florida Statutes, 1941) and is followed by Section 192.17, making it the duty of the Assessor to examine each claim for exemption filed with him, and to allow the same if found to be in accordance with law and approving the same and making the proper deduction on the tax books. This is the only statute I have been able to find affecting the subject.

I am not undertaking to give you any court construction on the right of a person, coming within the purview of the statute, to the exemption allowance when such person failed to file the annual return required by the statute, because your inquiry does not embrace this particular question. The assessor should follow the statute by requiring the return to be made.

May 15, 1943.—043-112.

**HOMESTEAD EXEMPTION—BOARD OF COUNTY COMMISSIONERS**

**QUESTION:** 1. What redress has the Tax Assessor under Senate Bill 123, Acts of 1935, in regard to rejection of homestead exemptions by him, which are later allowed by the Board of County Commissioners?

2. Is it mandatory upon the Assessor to accept the Board's actions as final, regardless of the merits of the case?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County, DeLand, Florida:*

In reply I wish to advise that the statute (Section 192.19, Florida Statutes, 1941) does not provide for a method of resort by the Tax Assessor and it does contain a provision that the Board of County Commissioners' action shall be final. I take this latter, however, to mean "shall be final" as to the taxpayer, unless such court procedure is taken within the fifteen-day limitation which the statute prescribes. However, the statute does not purport to prescribe the remedy of the Tax Assessor in the premises, and in my opinion the Tax Assessor may attack the action of the County Commissioners where such action is contrary to that of the Assessor upon any equitable grounds that may be available to the Tax Assessor. The Constitution gives the Circuit Court original jurisdiction in tax matters. The law also imposes upon the Tax Assessor the duty of making tax assessments correctly. The authority of the Board of County Commissioners is to equalize and correct, but the Legislature has not attempted to transplant the court jurisdiction in equity conferred under the Constitution, to the County Commissioners under the equalization functions which it has conferred upon such Commissioners.

June 1, 1943.—043-127.

**HOMESTEAD EXEMPTION—HEIR TO UNDIVIDED REAL ESTATE**

**QUESTION:** Has an heir to undivided real estate a right to claim homestead exemption from tax before estate is divided?

*To Honorable G. W. Watts, Tax Assessor, Washington County, Chipley, Florida:*

I wish to advise that previously published opinions of this office cover this question. However, since you may not have access to same I will repeat that under Article X, Section 7 of the Constitution it is specifically provided:

"Every person who has \* \* \* beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation \* \* \*. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person."

Obviously, this amendment covers the situation you have described since this heir would have the beneficial title in equity, and the Constitution provides the manner in which you shall assess it. Therefore, if the person claiming the homestead exemption is residing on said property and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon him, said person will be entitled to the exemption under the constitutional provision above quoted.

November 9, 1943.—043-296.

#### HOMESTEAD EXEMPTION—MUNICIPALITIES

**QUESTION:** What is the effect of Chapter 21988, Laws of Florida, Acts of 1943, with regard to whether or not a municipality is required to grant homestead exemptions where such exemptions have been granted by the county?

*To Honorable Harry E. King, State Senator, Seventh District,  
Winter Haven, Florida:*

I have carefully examined this act and it appears to me that the Legislature was simply trying to eliminate one place where the applicant for homestead exemption had previously filed his application. As you know, heretofore if the property upon which homestead exemption was sought was in the city the applicant filed with both the County Tax Assessor and the City Tax Assessor. The said Act eliminated this by providing that the application should only be filed with the County Tax Assessor and should be considered as having also been filed with the city and given the same effect. I do not believe that the Legislature intended that the city should be governed by the action taken by the County Tax Assessor upon the homestead exemption claimed just because it eliminated the filing of the application with the City Tax Assessor.

April 26, 1943.—043-106.

#### HOMESTEAD EXEMPTION—PERSONS IN THE ARMED SERVICES

**QUESTION:** May the County Tax Assessor set up his records in such a way as to allow, for the duration of the war, homestead exemption to men and women in the service without the necessity of their filing, or their next of kin filing, a renewal annually between January and April 1st?

*To Honorable J. N. Lummus, Jr., County Tax Assessor, Dade County,  
Miami, Florida:*

You state that you would like to have the authority to set up your records in order that you might annually, for the duration, allow exemption to men and women in the service without the necessity of their filing or their next of kin filing a renewal annually between January and April 1st.

You state further that you are afraid that many of these men and women over seas, with their families away from home, will fail to file. You state further that you have worked out an arrangement whereby you can recheck the title to the properties involved each year between January and April 1st, and if still owned by the man or woman in service on January 1st of the taxing year that you could automatically, under your system, grant the exemption.

In reply I wish to advise that I think your efforts along this line are most commendable, and I know that it will require much additional work on the part of your office. However, I also know that in your desire to render service that you do not take such extra work into consideration, and properly so. I believe that any system which would relieve the men and women in the armed services from any worries they might have regarding the security of their homes while they are in service protecting our homes should be done.

I believe that we should do all in our power to see that no person in the armed services is deprived of any rights by reason of the fact that he is wearing his country's uniform. I, therefore, not only heartily approve your proposed arrangement, but hope that it will be adopted throughout the State.

I am glad that you submitted this question to me and hope that I have contributed in a small way to the effort that you are making in this matter.

June 22, 1943.—043-148.

#### HOMESTEADS—TAXABLE FOR DEBT SERVICE

**QUESTION:** Are homesteads taxable for debt service as to bonded indebtedness?

*To Honorable Bryan Willis, State Auditor:*

Our Supreme Court has repeatedly held that homesteads are taxable for debt service as to bonded indebtedness existing at the time of the adoption of the exemption amendment. See Yowell, Tax Assessor, v. Rogers, 175 So. 772, and cases therein cited.

August 13, 1943.—043-203.

#### MUNICIPAL TAXES—DUTY OF CLERK OF CIRCUIT COURT

**QUESTION:** Under Section 36 of Chapter 22079, Acts of 1943, when does it become the duty of the Clerk of the Circuit Court to see that municipal taxes have been paid before he is authorized to sell county tax liens?

*To Honorable J. M. Lee, State Comptroller:*

I have carefully considered this question and it seems to me to be indisputable that the Clerk of the Circuit Court is not concerned with the payment of city taxes until after the bill of complaint has been filed as required by this section. Thereafter the Clerk must require the payment of all city taxes before he can allow anyone to purchase the outstanding tax certificates and he must continue to require the payment of the city taxes up until the return day of the notice that he is required to give under this section warning the owners of the land that on and after the return day named therein a decree would be sought against them. Thereafter the matter is in the hands of the Court. I say this because I think the language of this section is so very specific in that regard. It provides:

"On or before the return day of said notice any person, firm or corporation shall have the privilege of purchasing from the Clerk of the Circuit Court all tax liens . . . In the exercise of such privilege any person so purchasing said taxes and tax lien, shall likewise be required to purchase or pay any **municipal tax liens thereon outstanding and unpaid at such time**, and at the time such county tax liens are purchased from the Clerk of the Circuit Court, such purchaser shall file with such Clerk an official receipt of the municipality showing purchase or payment of such municipal taxes, which shall be a prerequisite before the privilege of purchase of county tax liens may be exercised." (Emphasis supplied).

July 6, 1944.—044-194.

#### MURPHY ACT TITLE; DISCLAIMER

**QUESTION:** May the State's claim of title under the Murphy Act be disclaimed, by the Trustees of the Internal Improvement Fund, as agents of the State, where the tax sale certificates in question were not within the provisions of Section 192.21, Florida Statutes, 1941?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

It appears, from the request for an opinion, that an application has been filed with the Trustees for a disclaimer of the State's claim to title to certain alleged Murphy Act lands, which appear to be vested in the State pursuant to the operation of the Murphy Act upon certain tax sale certificates of the tax sale of 1933. The tax sale certificates being unredeemed and uncanceled on June 9, 1939, were included in the list of Murphy



Act lands, or tax sale certificates, certified to the Trustees by one of the Clerks of the Circuit Court pursuant to the Murphy Act.

It appears from the application for disclaimer of the State's claim, that the tax sale certificates in question were issued against the lands in question without there having been any proper advertisement of the same for delinquent taxes as required by law (see Sections 193.51 et seq., Florida Statutes, 1941, and prior laws).

In my opinion, Section 192.21, Florida Statutes, 1941, should determine the action of the Trustees in passing upon this application. By said section it is in part provided:

"... no sale or conveyance of real or personal property for non-payment of taxes shall be held invalid except upon proof that the property was not subject to taxation, or that the taxes had been paid previous to sale, or that the property had been redeemed prior to the execution and delivery of deed based upon certificate issued for non-payment of taxes ..."

It is my opinion that the Trustees of the Internal Improvement Fund should not disclaim its title to any Murphy Act lands except upon proof that: (1) the property in question was not subject to taxation, (2) that the taxes had been paid prior to the sale, or (3) that the property had been redeemed from the lien of taxes due thereon prior to the vesting of title in the State under the provisions of the Murphy Act.

The application presented in this case does not seem to be within the scope of any one of the conditions herein set forth and the same, in my opinion, should be denied.

September 23, 1944.—044-285.

#### MURPHY LANDS—CONVEYANCE OF TITLE TO CHURCH

QUESTION: May Trustees of the Internal Improvement Fund disclaim the State's title and interest in and to certain property, recommend the cancellation of the tax sale certificate, or convey title to said property to a church without regular sale?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

The house and lot in question is said to be next to the First Methodist Church, and was purchased from a private individual by the Church on October 3, 1936. The house located on this property has been used by the Church as a Sunday School Department since the date of said purchase, and for eight years prior thereto.

You request my opinion as to whether the Trustees of the Internal Improvement Fund would be authorized to disclaim the State's title and interest in and to said property, and recommend the cancellation of the tax sale certificate, or to convey title to said property to the Church without regular sale.

It would appear that the property was subject to taxation for the year 1932 and that for the nonpayment of the tax assessed against said property, the same was sold to the State in 1933. Therefore, under my opinion to you of date July 6, 1944, the Trustees would not be justified in disclaiming the State's title to and interest in said property.

The Trustees of the Internal Improvement Fund are not authorized to convey the subject property to the Church except upon a regular sale held and conducted in accordance with the provisions of Section 192.38, Florida Statutes, 1941, as amended by Chapter 21684, Laws of Florida, Acts of 1943. The Trustees may, however, promulgate a rule applicable to this and similar cases whereby the amount of base bid required of an applicant for sale of Murphy Act lands would be reduced.

August 18, 1944.—044-246.

### MURPHY LANDS—DISCLAIMER OF TITLE

**QUESTION:** Where the Legislature, by valid act, directs the Comptroller to cancel designated state and county tax certificates, and such act becomes a law prior to the effective date of Section 9, Chapter 18296, Laws of Florida, Acts of 1937 (the Murphy Act), does the title to the lands described in such certificates vest in the State by reason of the failure of the Comptroller to cancel said certificates?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

Chapter 19211, Laws of Florida, Acts of 1939, directed the Comptroller to cancel all state taxes set forth in tax sale certificates theretofore issued against certain described lands, upon which lands all county taxes had been canceled by order of the Board of County Commissioners of Volusia County. The Act became a law without the Governor's approval, and was filed in the office of the Secretary of State on May 31, 1939. The tax sale certificates therein referred to were subject to cancellation by the Comptroller on said date.

When a valid statute imposes a duty upon designated officials, a failure to perform the duty does not affect the existence thereof, nor curtail the right to require performance in a proper case. See *State vs. Burr*, 84 So. 61. It is a well settled maxim that equity regards as done that which ought to be done, where nothing has intervened which ought to prevent a performance.

It is my opinion that the lands described in the certificates referred to in said Chapter 19211, did not vest in the State on June 9, 1939, under the provisions of the Murphy Act, by reason of the pre-existing duty of the Comptroller to cancel said certificates. It is further my opinion that, in order to clear the records, the apparent interests of the State in said lands under the provisions of the Murphy Act, should be disclaimed and said certificates recommended to the Comptroller for cancellation.

November 22, 1943.—043-311.

### MURPHY LANDS—RESALE

**QUESTION:** Do the Trustees of the Internal Improvement Fund have authority to order the resale of Murphy Act lands, for the purpose of giving one holding an agreement to convey, from the former owner, and executed prior to June 9, 1939, a chance to enter into competitive bidding for the property in question?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

On June 9, 1939, certain lands, then owned by "A," became vested in the state under the Murphy Act. Prior to said June 9, 1939, "A" entered into an agreement wherein he agreed to convey the lands to "B" upon certain conditions. On June 29, 1943, the said lands were advertised and sold, by the Trustees of the Internal Improvement Fund, for the State, after competitive bidding, to "C." At this sale the former owner, "A," bid for the property. However, it was sold to "C."

On October 12, 1943, "B," through an attorney, made application to the Trustees for a resale of the property, so as to enable him to bid for the property. It does not appear that any deposit of funds was made with the request for resale. The reason given, in the application, for the resale is that "B" "cleared this lot, put a fence on it and set it out to trees and shrubbery, as it was next to their lot their home was on."

The rules adopted by the Trustees pursuant to Section 192.38 Florida Statutes, 1941, authorize the Trustees to sell Murphy lands to the highest and best bidder for cash, according to such rules and regulations fixed

by the Board. One of the rules is that the Trustees retain the right to accept or reject any and all bids. Another is that anyone may protest a sale within 21 days of date of sale, providing certain deposit of funds is made with the Clerk.

The deed for the land has not yet been delivered to the Clerk, therefore the Trustees retain the right to accept or reject the bid made at the sale for this property. The Trustees' judgment is not affected by the fact that a request for resale has been made, the request having been made subsequent to 21 days after the sale date, and other rules relative to protest having not been complied with.

Therefore, it is my opinion that it is within the exclusive discretion of the Trustees in this matter, either to accept this bid and order delivery of deed or to reject the bid. I find nothing in the record that can affect such discretion of the Trustees in this case.

October 10, 1944.—044-300.

#### MURPHY LANDS—RIGHTS OF FORMER OWNER

**QUESTION:** After land has reverted to the State under the Murphy Act, what equitable right to a disclaimer from the Trustees does a former owner have who, several years after reversion, obtained a statement of, and was under the impression she was paying, all back taxes on all of her property?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

A careful examination has been made of this matter and it appears that an attempt was made to pay the taxes on the land in question several years after it vested in the State.

It is my opinion, therefore, that this situation does not show any equity that would justify the Trustees of the Internal Improvement Fund in disclaiming the State's title to the land.

October 13, 1944.—044-302.

#### MURPHY LANDS—RIGHTS OF MORTGAGEE

**QUESTION:** What title did a mortgage holder acquire who foreclosed and bought the property in at sale, said foreclosure being after title to the property had vested in the State under the Murphy Act?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

As you are aware, both the Trustees of the Internal Improvement Fund and an individual claim an amount in the registry of the Federal Court, awarded as compensation for the taking of certain land in condemnation proceedings. The Trustees, in their claim, have shown that title to the land vested in the State under the Murphy Act. The individual bases her right to the award upon the circumstance that she became the purchaser at a mortgage foreclosure sale, she being the holder of the mortgage foreclosed. Her action culminated after the title reverted to the State.

The Court has held that the vesting of the fee simple title in the State by the Murphy Act extinguished all private contract or statutory non-taxation liens, such as mortgages, then existing against the lands.

It is my opinion, accordingly, that the mortgage holder became possessed of no title to this land because the operation of the Murphy Act had the effect of erasing the lien of the mortgage. The award for this property properly belongs to the Trustees.

May 9, 1944.—044-145.

#### MURPHY LANDS—SALE

**QUESTION:** May the Trustees of the Internal Improvement Fund, when acting as agents of the State under the Murphy Act, where a municipality and an individual have agreed to purchase the lands and divide them, approve the bid with the understanding that a portion of the consideration, representing the portion of the lands to be retained by the municipality, will be refunded?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

A municipality and an individual agreed, prior to the sale of a parcel of Murphy land, to purchase such parcel in the name of the city. The city was to obtain title to a portion of the land, and the individual to obtain title to the remainder. The city was to request that its proportionate part of the bid be returned. Such agreement was made known to the Trustees after the bid was made and the claim filed for a proportionate part of the funds representing the interest of the city and based on a claim that under Chapter 21921, Laws of Florida, 1943, the city has the right to receive said land without public sale and without consideration.

The right of the Trustees to dispose of Murphy land is fixed by statute, and in addition to the right to sell to the highest and best bidder for cash at public sale, the Trustees have other powers to dispose of the land.

In the case at hand, the parties have chosen to obtain the land under the Trustees' power of sale under Section 198.38(a), Florida Statutes, 1941, as amended. Having chosen that method the regulations of the Trustees adopted pursuant to the statute apply. Under these conditions the Trustees have the power to accept or reject this bid. The power of the Trustees to convey these lands to a municipality without sale, under Chapter 21921, *supra*, may not be considered as long as the procedure for public sale, as provided by said Section 198.38(a), Florida Statutes, 1941, as amended, is pending.

In my opinion the Trustees may not approve the bid made and return a portion of the consideration, as such action will constitute a paying out of public funds without the authority of law. The Trustees have two courses they may follow in this instance: 1. To accept the bid and issue a deed to the purchaser. 2. To reject the bid and authorize a return of the funds deposited with the Clerk.

February 16, 1944.—044-56.

#### MURPHY LANDS—SALE BY MUNICIPALITIES

**QUESTION:** Where property that has reverted to the State under the Murphy Act is foreclosed and sold to an individual by a municipality without making the State a party to the foreclosure proceedings, may the interest of the State of Florida be sold thereafter by the Trustees?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

It appears that a parcel of Murphy land was included in a city foreclosure suit begun June 30, 1941; that the suit culminated in sale on February 7, 1944, and an individual purchased it at such sale. It also appears that there is pending an application for purchase of this parcel from the Trustees Internal Improvement Fund under the so-called Murphy Act., and the property is advertised to be sold on February 29, 1944.

Prior to the 1943 Session of the Legislature the State of Florida was not permitted to be sued by cities in the foreclosure of liens for taxes where the lands had reverted to the State under the Murphy Act on June 9, 1939. See *Prince-Hall v. Jacksonville*, 6 So. 2nd 250.



To remedy the stalemate between the cities and the State relative to Murphy lands, the 1943 Legislature, by Chapter 21896, Laws of Florida, 1943, gave the consent of the State of Florida to be sued in equity by municipalities to enforce tax liens held by such municipalities, and provided for a method of obtaining service on the State, and also provided for the manner and method of adjudicating and discharging the interest of the State.

Under such statutes the City of St. Petersburg could have joined the State in a suit to adjudicate the interest of the State and City in a tract of Murphy lands. However, an examination of the records of this office reveals that no attempt was made to make the State a party and to adjudicate its interest in the suit referred to. The State not having been made a party to the suit and its interest adjudicated, there is a title remaining in the State of Florida and may be disposed of by the Trustees of the Internal Improvement Fund under the provisions of the Murphy Act; that upon sale of the land, as above provided, the interest acquired by the purchaser from the city will be extinguished under the theory laid down in the case of *Smith v. City of Arcadia*, 2 So. 2nd 725.

It is my opinion, that unless the State of Florida is made a party to a suit to foreclose municipal liens as permitted by Chapter 21896, Laws of Florida, Acts of 1943, and its interest adjudicated, that notwithstanding sale by a municipality, the Trustees of the Internal Improvement Fund may proceed to sell Murphy Lands previously foreclosed and sold under municipal tax foreclosures.

June 12, 1944.—044-168.

#### MURPHY LANDS—SALE OR LEASE

**QUESTION:** 1. May the Trustees of the Internal Improvement Fund withhold Murphy lands from sale and execute oil and mineral leases on such lands?

2. Should the Trustees recognize the application of a former owner of Murphy lands, or his mortgagee, to buy the same at a Murphy sale, in the presence of an application for their lease for oil development?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

The State of Florida acquired the above described sections under and by virtue of Chapter 18296, Laws of Florida, Acts of 1937, commonly known as the Murphy Act. Parties claiming to hold a mortgage interest in the above lands seek to have said lands sold to them at public sale as provided by Section 192.38 (1)(a), Laws of Florida 1941, as amended, and request that such sale be made subject to a lease of the oil and mineral rights heretofore agreed upon by the Trustees of the Internal Improvement Fund. In addition to the right to sell the lands, the Trustees by Section 192.38 (1)(d), Florida Statutes 1941, as amended, have the option of withdrawing from public sale tracts or parcels considered by the Trustees of the Internal Improvement Fund to be valuable for public purposes. Under Subsection (1)(a) above mentioned, the Trustees have adopted rules and regulations whereby any bid made by a prospective purchaser may be rejected by the Trustees. Under such subsection, the Trustees would not be required to sell such lands if they did not see fit to accept a bid therefor.

Whether or not parcels of Murphy lands should be sold and bids accepted, and whether or not parcels may be withdrawn from sale and held for public use, is entirely a matter for the discretion of the Trustees of the Internal Improvement Fund.

It is, therefore, my opinion that the above mentioned lands may, at the discretion of the Trustees, be leased for oil purposes, and such lands withdrawn from public sale. It is also my opinion that the Trustees after having agreed to lease Murphy lands for oil development may sell the said lands at a regular Murphy Sale subject to the lease and retain for the state the oil royalty reservation required under their rules.

REVOKED IN PART. SEE OPINION DATED  
APRIL 17, 1945 (045-88).

February 23, 1944.—044-49.

#### STATE PROPERTY—EXEMPTION

**QUESTION:** Are lands acquired by a state agency for public use, by deed dated in 1941 but delivered during the tax year of 1942, subject to taxation for the years 1942 and 1943; and,

Are other lands, likewise acquired by deed dated and delivered during the tax year of 1943, subject to taxation for the year 1943?

If such lands are subject to taxation, is such state agency required to pay such taxes?

*To Honorable I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

It appears from the request for an opinion that the Game and Fresh Water Fish Commission, of this state, acquired three tracts of land; the first by deed dated December 31, 1941, but not delivered until sometime during the year 1942; the second by deed dated and delivered about January 11, 1943; and the third by deed dated and delivered about April 23, 1943; that the Tax Collector, of the county wherein such lands lie, submitted statements for unpaid taxes on the first tract for the years 1942 and 1943; on the second tract for the year 1943; and on the third tract for the years 1942 and 1943.

All taxable real and personal property is subject to taxation as of the first day of January of each year and the tax lien upon such property is effective as of said date. Section 192.04, Florida Statutes, 1941. However, all real and personal property belonging to the State of Florida is exempt from taxation. Section 192.06, Florida Statutes, 1941, as amended by Chapter 21742, Laws of Florida, Acts of 1943. It would follow that all the lands in the first tract, above mentioned, were subject to taxation for the year 1942 and prior years, but were not subject to taxation for the year 1943; the lands in the second and third tracts were subject to taxation for the year 1943 and prior years.

It is my opinion that the Game and Fresh Water Fish Commission has the authority to expend the Commission's funds for the purpose of discharging a valid tax lien upon lands held by the State for the use and benefit of the Commission. It is my opinion, however, that the tax liens herein referred to could not be enforced by foreclosure or other court procedure against the State and the lands mentioned by reason of the fact that title of such lands is vested in the State of Florida, and the State has not given its consent to be sued for the purpose of foreclosing county tax liens against lands held by it.

#### TAX ASSESSMENTS AND SALES

February 16, 1944.—044-55.

#### ASSESSMENT OF MINERAL RIGHTS

**QUESTION:** Is a tax assessment personal or real, against mineral rights separate and apart from the real estate in question, a legal assessment?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County, DeLand, Florida:*

In reply to your inquiry I beg leave to state that I know of no present existing authority for the separate assessment of mineral rights.

It is my opinion, therefore, that such a separate assessment would not be a legal assessment.

In the case of Camp Phosphate Company v. Allen, Tax Collector, 81 So. 503, the Supreme Court of the State of Florida had occasion to pass

upon an attempted assessment of the mineral rights in connection with certain lands of the appellant. For your information, the apposite portion of the opinion is as follows:

"(10) Valuations for taxation must have a just relation to the real and known value of the property assessed, and not to some unknown and speculative value, and there must be no substantial inequality in valuations in the various kinds and items of property that is subject to tax. There is no law requiring the assessor to prospect land to ascertain if it contains valuable mineral deposits; neither is there any law compelling the owner of land to expend \$75 or \$100 an acre prospecting his land for the information of a tax assessor. If the assessor had exercised a small degree of interest for the welfare of the corporations, as was manifested for the farmers and orange growers, he evidently would not have found it necessary to assess large tracts of land known by him to be non-mineral, at an excessive, fictitious valuation, in order to assess a deposit which by some unknown means he estimated to contain 2,000 tons, when, it seems, it should be a matter of common knowledge throughout the county where phosphate mining has been carried on for many years, during which time he has resided there, that a deposit of less than 10,000 or 15,000 tons is of no value for mining purposes and adds no value to the land.

"When the Assessor has not sufficient knowledge or information of the real value of a mineral deposit upon which to base a fair and equitable valuation, he should assess the land, upon some basis of known value obtainable as required by law."

August 11, 1944.—044-230.

#### CONSTRUCTION OF NEW COURTHOUSE

**QUESTION:** May millage for the construction of a new county courthouse be classified as "operating expenses" under Section 193.03, Cumulative Supplement to Volume I, Florida Statutes, 1941?

*To Honorable Spessard L. Holland, Governor:*

My opinion of August 3rd on the above subject was confined to the question propounded, that is, whether millage assessed for the construction of a courthouse should be classified as operating expenses under Section 193.03, Florida Statutes, 1941, as amended by Chapter 22079, Acts of 1943. It was held that it should not.

It now occurs to me that inasmuch as the County Attorney's letter states that the County Commissioners propose to add three mills to the budget to raise the funds for erecting the new courthouse, it might not be inappropriate to supplement my opinion by calling attention to other provisions of that section as well as Section 135.01, Florida Statutes, 1941.

After the proper procedural steps have been taken, said Section 135.01 authorizes the levy of a building tax not exceeding five mills per year for not more than five consecutive years in lieu of all other county building tax.

Among the other provisions of amended Section 193.03 there is the requirement that the Board of County Commissioners

"... shall for the fiscal years 1943-1944 and 1944-1945 reduce the millage to be levied for those years by each such board or taxing authority from what it was for the fiscal year 1940-1941 proportionately to the increase in the ratio of assessed value to full cash value for the fiscal years 1943-1944 and 1944-1945 over the ratio of assessed value to the full cash value for the fiscal year 1940-1941."

It is my opinion that the foregoing provision of Section 193.03 applies to the millage authorized by Section 135.01 as well as other millage and

that the maximum of five mills authorized by Section 135.01 must be reduced by the County Commissioners in accordance with the formula set out in amended Section 193.03 quoted above.

July 15, 1943.—043-162.

#### COUNTY BUDGETS

**QUESTION:** Has the Polk County Budget Commission jurisdiction over a budget prepared by the Board of County Commissioners and/or the County School Board when the aggregate of the proposed budget does not exceed 5 per cent as compared with the budget for the preceding year or for the year 1940-1941, whichever may be the larger, when some item therein for operating expenses does exceed by more than 5 per cent the budget for the preceding year or for the year 1940-1941?

Does the following provision:

"In the event such budget making authorities determine that the budget, or some item therein, for operating expenses, should be increased more than five (5%) as compared with the budget for the preceding year or for the year 1940-1941, whichever may be the larger, then such budget making authority shall proceed as follows:"

when the facts supporting the foregoing provision exist, deprive the County Budget Commission of jurisdiction to pass on the budget under such circumstances?

*To Honorable Thomas W. Bryant, Special Attorney for the Budget Commission, Lakeland, Florida:*

In reply I wish to advise that I am of the opinion that the intention of the Legislature in the enactment of our taxing statute at its last two sessions was in some manner to fix a point beyond which the County Commissioners could not go in fixing the tax millage so that the taxes finally levied would not be a burden upon any taxpayer but it did not intend thereby to unnecessarily hamper the county in its affairs generally.

With that premise in mind I shall construe the particular section of the 1943 Act mentioned in your letter to mean that it is not necessary for the Polk County Budget Commission to submit the budget to anyone else just because some item in the budget exceeds by five per cent the same item in the budget for the preceding year or for the year 1940-1941, so long as the aggregate amount of the proposed budget does not exceed that for the preceding year or for the year 1940-1941 by five per cent.

I believe that this answers the questions that you have propounded.

April 8, 1943.—043-95.

#### DELINQUENT TAX LIST—ADVERTISEMENT

**QUESTION:** When must the delinquent tax list be advertised?

*To Honorable A. J. Dunham, Member, House of Representatives, Capitol:*

Under the decisions of our State Supreme Court in *Stieff vs. Hartwell*, 35 Fla. 606, 17 So. 899 and *Jenkins vs. Entzminger*, 102 Fla. 167, 135 So. 785, it has been held: "A provision in the statute naming a time when an act is to be done in the assessment and collection of taxes is, as a general rule considered a direction and not a limitation." Under this rule of law it is not mandatory that the delinquent tax list be published at the time the statute specifies. Where the publication of this delinquent tax list is deferred and carried out within a reasonable time under the controlling facts such deferment is not a matter that would invalidate the publication or make defective tax sales held thereunder.



June 1, 1944.—044-160.

#### OMISSION OF PROPERTY FROM TAX SALE NOTICE

**QUESTION:** May a Tax Collector who has omitted valuable land from a tax sales advertisement, following the procedure provided by law for the first notice, run a second advertisement, thus having two sales dates of delinquent taxes in his county for the same year?

*To Honorable J. M. Lee, State Comptroller:*

I beg leave to state that it is my opinion that the situation can be saved by, and only by, another advertisement clearly describing the land and referring to a day of sale sufficiently distant to permit the running of the advertisement for the statutory period.

March 14, 1944.—044-100.

#### TAX ASSESSOR—COMMISSION

**QUESTION:** Is the County Assessor entitled to a commission on money paid to the county in lieu of taxes on a Federal Housing Project?

*To Honorable Bryan Willis, State Auditor:*

I have carefully considered this matter because I realize that the Tax Assessor undoubtedly does have a certain amount of work to do in connection with properties that are in a Federal Housing Project. However, the Tax Assessor's compensation is entirely controlled by statute and a Tax Assessor is therefore only entitled to receive the compensation provided by law when he is acting as Tax Assessor, and although he is acting as Tax Assessor in this instance, the law does not provide for any compensation for such services.

I am, therefore, of the opinion that a Tax Assessor is not entitled to a commission on money paid to the county in lieu of taxes on a Federal Housing Project. I believe, however, that if this matter were placed before the Legislature, provision would be made for a commission to the Tax Assessor in such a situation.

April 5, 1943.—043-84.

#### TAX ASSESSOR—COMMISSIONS

**QUESTION:** In view of the 1941 Act which increases the Tax Assessor's Commission on taxes assessed by him, from two per cent to three per cent, does the same increase apply also to the commissions which the Clerk of Circuit Court is required to compute and when tax sale certificates are redeemed? The question, of course, applies only to percentage on "subsequent and omitted taxes," if any, collected by the Clerk in connection with the redemption or purchase of certificates.

*To Honorable Sidney F. Dick, Tax Assessor, Hernando County,  
Brooksville, Florida:*

Chapter 17876, Acts of 1937, fixed the fees of Tax Assessors for taxes actually levied by them in Section 1 of this Act. Section 2 fixed the fees of the Tax Assessor on all subsequent and omitted taxes where a tax certificate was redeemed through the Clerk of the Circuit Court. Section 1 of the Act was amended by Chapter 20936, Acts of 1941. It was by this Act that the commissions were increased. However, Section 2 of Chapter 17876 was not amended and it remains the same as it existed in 1937 and provides for two per cent rather than three per cent. Therefore, the commissions on taxes actually assessed by you are controlled by Chapter 20936, which has become Section 193.65, Florida Statutes, 1941. Section

2 of Chapter 17876 controls when tax certificates are purchased or redeemed and the Clerk of the Circuit Court adds subsequent or omitted taxes. This has now become Section 193.66, Florida Statutes, 1941.

June 15, 1944.—044-170.

#### TAX ASSESSOR—COMPENSATION FOR UNOFFICIAL WORK

**QUESTION:** Where the Tax Assessor of a county within the Everglades Drainage District performs certain services for the District in connection with the assessment of drainage taxes, the same not being services required of him as Tax Assessor, for which he is paid by the Drainage District, should such compensation be considered as income of the office within Chapter 145, Florida Statutes, 1941?

*To Honorable Bryan Willis, State Auditor:*

The Tax Assessor in question received compensation equal to one per cent on the unextended part of the taxes levied on property in his county by the Everglades Drainage District, which compensation he claims was paid to him for work done which it was not his statutory duty to perform, and that the compensation belongs to him personally and not to him as Tax Assessor.

Checks for said compensation were made out to him individually and not as Tax Assessor. It further appears that the work for which he received this compensation was performed by members of the staff of his office but that they were paid extra for the work and the extra payments were not charged as office expense.

Having no facilities for making the breakdown of the properties to be assessed, and realizing that it would be very expensive to have the work done by outside parties who were not familiar with such matters, the Drainage District entered into the agreement with said Tax Assessor, individually, employing him to prepare the lists and breakdown of properties.

Section 3, Chapter 20658, Laws of Florida, Acts of 1941, made it the duty of the Board of Commissioners of Everglades Drainage District to annually levy and impose a tax on lands within the District. Section 4 of the Act, in part, is as follows:

"After such special taxes or assessments have been levied and imposed by the Board, and prior to the first day of August, 1941, and prior to the first day of July in each year thereafter, the Secretary shall prepare for each county containing lands within the District upon which such special taxes or assessments are authorized to be levied, a list of lands lying within such County, and upon which such special taxes or assessments are imposed for such year. The said lands, when convenient so to do, may be described by sections, townships and ranges. It shall not be necessary to set forth in such lists the name or names of the owner or owners of any lands, nor the names of any person interested therein. The said lists shall show with respect to each section, piece or parcel of land described therein the special taxes or assessments levied by or for Everglades Drainage District for such year . . ."

Said Section further provides that after formal approval of the list by the Board, the same should be transmitted to the County Assessor of Taxes of each County containing lands within the District on which special taxes and assessments were levied.

Section 5 of the Act, in part, reads:

"That Section 52 of Chapter 14717, Laws of Florida, Acts of 1931, as amended by Chapter 17902, Laws of Florida, Acts of 1937, be and the same hereby is amended to read as follows:

"Section 52. It shall be the duty of the Tax Assessor of each of the several counties embraced in whole or in part within said

Everglades Drainage District to receive the list herein required to be certified to him by the Secretary, and he shall enter upon the tax roll of the county of which he is the Tax Assessor the total amount of the taxes and assessments shown by said list to be assessed and imposed upon each parcel of land within such county for the year for which the said list is furnished . . . " .

The Tax Assessor is required under Section 145.03, Florida Statutes, 1941, to file with the County Commissioners a return of the compensation received by him, paid wholly or in part by fees or commissions "for his official duties."

If you refer to Section 5 of Chapter 20658 quoted above it will be observed that the only statutory duty of the Tax Assessor was to receive the lists which might be prepared by the Drainage District and enter on the roll the total amount of taxes and assessments shown by the lists to be assessed upon parcels of land in the county. It was the duty of the Secretary of the Board to prepare the lists and the breakdown of the properties. The preparation of the lists being no part of his statutory duties, the compensation received by the aforementioned Tax Assessor for such work, under the circumstances set out above, was not a fee or a commission received for his official duties, nor was it income of his office.

The same conclusion was reached by my predecessor in considering a similar transaction under Sections 1537 and 1538, C.G.L., which were in substance the same as Sections 4 and 5, respectively, of Chapter 20658, quoted above. (See Biennial Report of the Attorney General, 1939-1940, page 72).

It is my opinion that such compensation should not be included in said Tax Assessor's return to the County Commissioners.

March 29, 1943.—043-82.

#### TAX BOOKS—CLOSING DATE

**QUESTION:** Will the law permit tax books to be held open until the 1st of May rather than the 1st of April, when the books were not presented to the Tax Collector until the 4th day of December, instead of on the 1st day of November, the delay being due to a difference between the Tax Assessor and the Comptroller as to assessments?

*To Honorable Leo Sims, Tax Collector, Jackson County, Marianna, Florida:*

The law does not permit the tax books to be held open at any time. However, because of the enactment of the 1941 Laws in that particular year and in 1942 because of the lateness of the books, I did say that under certain conditions the books should not be closed. However, if you received the books on the 4th day of December they were little more than thirty days late, and it seems to me that anybody who desired to pay his taxes could have done so, or could do so prior to the first day of April.

I would allow everybody who mailed a check prior to midnight of March 31 and anyone who was standing in line waiting to pay his taxes at the close of business on March 31 to pay the same. I appreciate the situation in which you find yourself, but I think you know the law does not invest anyone with the discretion to extend dates for the payment of taxes.

July 26, 1943.—043-185.

#### TAX CERTIFICATES—PROCEDURE

**QUESTION:** What is the exact procedure to be followed under Section 15, Chapter 20722, Laws of Florida, Acts of 1941, when someone bids off all the interest?

*To Mrs. Edna M. Platt, Tax Collector, DeSoto County, Arcadia, Florida:*

This section reads:

"The land shall be struck off to the person who will pay the tax, interest, costs and charges and will demand the lowest rate of interest for the first year, not in excess of the maximum rate allowed by law."

My construction of this act is that it becomes your duty to sell a tax certificate whenever a person will pay the tax, interest, costs and charges and will bid a lower rate of interest than anyone else. If he bids no interest, then he is entitled to the purchase of the tax certificate, and it will not be your duty to attempt to secure any other bid, as the statute is specific that the tax certificate shall be struck off to the person who bids strictly in accordance therewith, and while the statute speaks of land, it really means that the purchaser is buying a tax certificate and of course is not entitled to a deed until the period of time has elapsed that will permit him to make application for same. The bidder, therefore, is really not purchasing any interest in land.

August 6, 1943.—043-183.

#### TAX COLLECTOR—DEDUCTIONS OF COMMISSIONS

**QUESTION:** Does the Tax Collector have authority to deduct his commission from the maintenance, interest and sinking fund taxes before depositing same to school district accounts?

*To Honorable J. L. Arnow, Tax Collector, Alachua County, Gainesville, Florida:*

Section 236.53, Florida Statutes, 1941, (Section 1053, School Code) relating to levy of taxes for bonds, provides in part, "The county tax collector shall turn over to the county school depository or depositories, as designated by the county board, all money collected for the interest and sinking fund of all bonds issued and outstanding against any such school district."

Section 237.18, Florida Statutes, 1941 (School Code 1076), further relating to the levy of taxes provides in part, "The collector shall collect said taxes and pay over the same promptly as collected to the county school depository or depositories, to be used as provided by law."

Section 193.65 (1 and 2), Florida Statutes, 1941, provides in part, "The commissions for assessing and for collecting all special school district taxes shall be audited by the Board of Public Instruction of each respective county and taken out of the funds of the respective special school districts under its control and allowed and paid to the said tax assessors for assessing such taxes and to the tax collectors for collecting such taxes."

I find no statutory authority for deducting commissions as you suggest; and, in addition, the above statutes which specifically direct procedure for handling collections and payment of commissions seem to prohibit and preclude any such deductions.

While I appreciate the saving of the work of making all the small checks for the respective districts, this is a matter for consideration by the Legislature and would require the amendment of such statutes so as to permit the suggested procedure.



May 27, 1943.—043-116.

#### TAX COLLECTOR—FINAL REPORTS

QUESTION: Are Tax Collectors required to make final reports under Section 193.50, Florida Statutes, 1941?

To Mrs. Edna M. Platt, Tax Collector, DeSoto County, Arcadia, Florida:

I wish to advise that Section 193.50, Florida Statutes, 1941, which was Section 7, Chapter 20722, Acts of 1941, provides that this report shall be made, and of course, as you know, neither I nor any one except the Legislature can tell you otherwise. It would, therefore, be my suggestion that you make the same according to the law.

March 21, 1944.—044-91.

#### TAX COLLECTOR OF OKEECHOBEE COUNTY—FEES

QUESTION: 1. May the Tax Collector of Okeechobee County now elect to come under Chapter 21918, Laws of Florida, Acts of 1943, or must she continue subject to Chapter 20512, Laws of Florida, Acts of 1941?

2. If such Tax Collector should take advantage of Chapter 21918, what would be the effect of her so doing?

To Honorable Bryan Willis, State Auditor:

Chapter 21918 is a general act relating to the commissions of all Tax Assessors and Tax Collectors of the counties of the State. Chapter 20512, a special act, relates solely to the commissions of the Tax Assessor and Tax Collector of Okeechobee County.

Chapter 21918 provides in part:

"Provided further, that where any assessor of taxes or tax collector in the State of Florida is receiving compensation for expenses in conducting his office or by way of salary pursuant to any Act of the Legislature other than the General Law fixing compensation of assessors, such assessor of taxes or tax collector may file a declaration in writing with the Board of County Commissioners of his county electing to come under the provisions of this Act, and thereupon such assessor or collector shall be paid compensation in accordance with the provisions of Section 1 hereof, and shall not be entitled to the benefit of the said special or local act. If such assessor of taxes or collector does not so elect, he shall continue to be paid such compensation as may now be provided by law for such assessor or collector.

"Section 2. The provisions of this Act shall apply to taxes assessed for the year 1943 and subsequent years, and commissions on taxes levied for prior years shall be paid at the rate in effect at the time of the passage of this Act."

It is my opinion that the Tax Collector of Okeechobee County, by complying with the foregoing quoted provisions, may now come under Chapter 21918 there being no limitation as to the time when such election shall be made, provided such election, when made, should not operate unreasonably or cause confusion.

If the Tax Collector elects at this time to come under Chapter 21918, I am of the opinion that in view of the provisions of Section 2 of said Chapter she should after such election be paid commissions on 1942 taxes and prior years as allowed in Chapter 20512, Acts of 1941, but as to 1943 taxes and taxes for subsequent years she should be paid commissions as allowed in Chapter 21918. It follows also that after such election is made there will no longer be any authority for payment in any year to the Tax Collector of the guaranteed amount of \$2,000 as provided by Chapter 20512.

January 13, 1944.—044-14.

#### TAX ASSESSOR AND TAX COLLECTOR—COMMISSIONS

**QUESTION:** What is the method of computing commissions of Tax Assessors and Tax Collectors, under Chapter 21918, Section 1, General Laws of 1943?

*To Honorable D. H. Sloan, Jr., Clerk and Auditor, Polk County, Bartow, Florida:*

The Assessor and Collector are entitled to 10 per cent on the first \$5,000.00, 5 per cent on the next \$5,000.00, 3 per cent on the balance of taxes levied up to the amount of \$50,000,000.00 and 2 per cent on the balance. Under your figures the Tax Assessor and Tax Collector would receive 10 per cent on the first \$5,000.00 of the \$426,000.00 total, 5 per cent on the next \$5,000.00 of said amount, and 3 per cent on the balance, which would be 3 per cent of \$416,000.00. This seems to be the only construction that you can place upon this act because it provides for a commission of 10 per cent on the first \$5,000.00, 5 per cent on the next \$5,000.00 and 3 per cent on the balance up to an assessed valuation of \$50,000,000.00 and 2 per cent on the balance, (this balance being the assessed valuation in excess of \$50,000,000.00).

September 22, 1944.—044-281.

#### TAX ASSESSOR AND TAX COLLECTOR—COMMISSIONS

**QUESTION:** What commissions should be paid to the Tax Collector and the Tax Assessor, under Chapter 18879, Acts of 1937, and Chapter 21918, Acts of 1943?

*To Mr. Oliver Lawton, Secretary-Treasurer, St. Augustine Port, Waterway and Beach Commission, St. Augustine, Florida:*

It appears that the Commissioners of the St. Augustine Port, Waterway and Beach District are of the opinion that 1 per cent is all that should be paid to the Tax Collector and Tax Assessor as fixed by Chapter 18879, Acts of 1937.

Investigation discloses that Chapter 18879, Acts of 1937, was repealed by Chapter 17876, Acts of 1937, by the circumstance that while the number of the chapter would tend to indicate that it was a prior act, it in fact became a law a few days after Chapter 18879, and repealed the former special act.

Chapter 20936, Acts of 1941, was the applicable law prior to the passage of Chapter 21918, Acts of 1943, which is the present law.

Section 2 of Chapter 21918, Acts of 1943, provides as follows:

"The provisions of this act shall apply to taxes assessed for the year 1943 and subsequent years and commissions on taxes levied for prior years shall be paid at the rate in effect at the time of the passage of this act."

This would mean that commissions on taxes assessed for prior years shall be paid as prescribed by Chapter 20936 of the Acts of 1941.

I trust that this will make plain the matter, which has been complicated by the peculiar circumstances of the repeal of the provisions of Chapter 18879 applicable to the compensation of Tax Collectors and Tax Assessors.

February 17, 1943.—043-51.

#### TAX ASSESSOR AND TAX COLLECTOR—FEES

**QUESTION:** 1. In calculating the compensation of \$2,400 guaranteed to the officers under the provisions of Chapter 19127, Acts of 1939, should receipts from the following sources be included: (a) from tax re-

demptions to the Assessor under Section 193.66, and to the Tax Collector under Section 193.52, Florida Statutes, 1941; (b) receipts to the Tax Collector arising from the sale of motor vehicle license tags; (c) commissions on assessment or collection of intangible taxes under Section 199.06?

2. If only the "net commissions" as set out in Section 1 of the act are to be considered, does the expression "net commissions" mean the net amount of such commissions after deducting the expenses of the office, or does it merely mean the net amount received for such commissions?

*To Honorable Bryan Willis, State Auditor:*

Although said Chapter 19127, Laws of Florida, Acts of 1939 may be unconstitutional and void as being in violation of Section 20 and maybe Section 21, Article III, Florida Constitution, we will not attempt to pass upon the constitutionality of the Act in this opinion. Under said Chapter 19127, (1) the County Assessor of taxes of Bradford County, Florida, is entitled to receive certain stated compensation for assessing **general and special taxes** and a certain stated compensation for assessing special tax district taxes; and (2) the County Tax Collector of Bradford County, Florida, is entitled to receive certain stated compensation for collecting **general and special taxes**, including license taxes by express words, and a certain stated compensation for collecting special tax district taxes. General taxes are those taxes levied and collected for the support of the government, whereby the government exists, and are exacted in return for the general benefits of government and not for specific benefits; this being true it seems that tangible and intangible taxes and other like levies should be considered as general taxes within the purview of Chapter 19127. Special taxes are usually considered as compensation for special benefits to the party paying. Corporate privilege taxes, excise taxes, gasoline taxes, mileage taxes, privilege taxes (25 Words and Phrases 215, et seq.). Therefore, it would seem that all license taxes collected by the Tax Collector are within the purview of Chapter 19127, including license taxes for motor vehicles. The fees payable to the Tax Assessor and Tax Collector upon redemption of delinquent taxes under Sections 193.52 and 193.66, Florida Statutes, 1941, are nonetheless compensation for assessing and collecting taxes, although not paid until some time subsequent to the date earned. These taxes appear to be within the purview of Chapter 19127.

I am, therefore of the opinion:

1. That in calculating the compensation of \$2,400 guaranteed to the officers under the provisions of Chapter 19127, Acts of 1939, receipts from the following sources should be included: (a) from tax redemptions to the Assessor under Section 193.66, and to the Tax Collector under Section 193.52, Florida Statutes, 1941; (b) receipts to the Tax Collector arising from the sale of motor vehicle license tags; and, (c) commissions on assessments or collection of intangible taxes under Section 199.06.

2. That the "net commissions" mentioned in the Act are to be considered as the net amount of such commissions after deducting the expenses of the office but not including the salary allowed the County Assessor and Tax Collector under the general laws.

The purpose of the Act is to guarantee the officer a salary of \$2,400.00 per annum and if the net commissions to which the officer is entitled as salary do not amount to the sum of \$2,400.00, then a sum sufficient to make up the difference between said sum and \$2,400.00 is to be taken from the general revenue fund of the county.

May 26, 1943.—043-120.

#### TAX ASSESSOR AND TAX COLLECTOR—FEES

QUESTION: Should the twenty-five cent charge per application, allowed Tax Collectors by Section 320.04, Florida Statutes, 1941, be included in the net commission allowed and received by the Tax Collector,

under Section 2 of Chapter 19127, Acts of 1939, when aggregating the income of the office under said section?

*To Mr. Joe Hill Williams, Attorney at Law, Lake Butler, Florida:*

Letters and affidavits of members of the Legislature as to what they intended to accomplish by any particular act are of doubtful verity, if at all admissible (*Security Feed and Seed Company vs. Lee*, 138 Fla. 592, 189 So. 869, text 870; 59 C. J. 1017 Section 604.) The general rule is that evidence by a member of the Legislature, or by a third person, is not admissible on the question of legislative intent (59 C. J. 1038 Section 615.) This being true, little consideration may be given to the letters relating to the intent of the Legislature when it enacted said 1939 Act.

Prior to the enactment of said Chapter 19127 the compensation of the Tax Assessor and the Tax Collector of Bradford county was evidently governed by Chapter 16954, Laws of Florida, Acts of 1935. There appears what may be a material difference between said Chapters 16954 and 19127. Section 2 of said Chapter 16954, Laws of Florida, Acts of 1935, provided that "in the event the commissions . . . under the provisions of Section 1 hereof, or otherwise, shall not amount in the aggregate to the sum of \$2300.00, the county commissioners shall allow and pay . . . the difference between the aggregate amount so received and \$2300.00" from the General Revenue Fund of the county to the said Tax Assessor or Tax Collector. The language of Section 2 of said Chapter 19127 is substantially the same as the above quoted language from the 1935 Act. However, it omits the words "or otherwise" used in the 1935 Act. Under Section 1 of said Chapter 19127, the Tax Collector is entitled "to commissions upon the aggregate amount of the taxes, general or special, collected, including license taxes, but not on each separately." The above reference to "including license taxes" seems sufficient to include motor vehicle license charges, as such are referred to and designated as license taxes by Section 13, Article IX, Florida Constitution.

When we construe said Chapter 19127 in connection with Sections 320.03 and 320.04, Florida Statutes, 1941, we find that the Legislature, by a general statute, has provided that the Tax Collector shall receive a service charge of twenty-five cents for each application for a motor vehicle license handled in lieu of all other fees and commissions, or, as expressed in the statute, "as full compensation for all services rendered in connection with the handling of the application." Section 320.04, Florida Statutes, 1941, provides that said twenty-five cents "shall be retained by the tax collector as other fees accruing to the tax collector's office."

Except for the provisions contained in said Sections 320.03 and 320.04, Florida Statutes, 1941, the Tax Collector, under the provisions of Chapter 19127 would be entitled to a commission on the amount collected as license taxes on automobiles. It seems clear from Section 320.04, Florida Statutes, 1941, that the Legislature intended the twenty-five cent fees allowed by said section to be in lieu of the fees the Tax Collector would otherwise be entitled to under the fee laws applicable to them. In other words, the said sum is the Tax Collector's commission for collecting the taxes and issuing the license, and is to be substituted in lieu of his general compensation for that item.

Because, under the motor vehicle laws, the sum of twenty-five cents is substituted in lieu of any sum the Tax Collector of Bradford county might be entitled to under the provisions of Chapter 19127, I am of the opinion that such compensation should be included in calculating the Tax Collector's compensation under Chapter 19127, notwithstanding the absence of the words "or otherwise" from the 1941 Act.

The law in question, Chapter 19127, Laws of Florida, Acts of 1939, is no limitation upon the total compensation which may be earned by the County Assessor of taxes or the County Tax Collector, but is merely



intended to guarantee such officials the sum set out in said act. The fees received in connection with the sale of automobile tags should be counted in determining whether or not the income of the office is equal to, exceeds, or is less than, the amount guaranteed by the said act. However, the official receives all the fees and compensation earned by his office from whatever source, even though they may exceed the sum guaranteed by the said 1939 Law, so long as the total of such fees and compensation do not exceed the limit placed upon the compensation of such official by Section 145.01, Florida Statutes, 1941, which is the general law upon this question.

### TAX SALE CERTIFICATES AND DEEDS

March 29, 1943.—043-89.

#### CANCELLATION — ASSESSMENTS EXCEEDING CONSTITUTIONAL EXEMPTION

**QUESTION:** Would a widow, claiming exemption under Article IX, Section 9 of the Constitution of the State of Florida, be entitled to cancellation of all or a portion of a tax certificate where assessment exceeded \$500.00, or should such property be offered for sale under the Murphy Act?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

Since the case of *Shuptrine vs. Wohl*, recited in 3 So. 2d. 524, laying down the doctrine that in cases of "special equities," redemption of tax certificates is permitted where the facts and circumstances show that the lands should not have reverted under Chapter 18296, Acts of 1937, the Trustees have wide discretion in determining whether or not redemption of certificates should be authorized. However, each case should be taken separately and no general rule may be exactly fixed as to what "special equities" authorize cancellation.

From the certificate furnished by the Clerk in this matter, the valuation of the property in 1933, the tax year for which it was assessed, was \$600.00. The taxpayer is entitled to \$500.00 exemption under the Constitution of the State of Florida and because of this "special equity," it is my opinion that the Trustees are authorized, on such showing, to direct that the certificate be cancelled and taxes be paid on valuation based on difference between assessment and exemption.

June 9, 1943.—043-140.

### CANCELLATION OF TAX CERTIFICATES

**QUESTION:** Does the redemption of tax certificates representing taxes for 1933, 1934 and 1935 on May 15, 1939, and the payment of 1932 and 1936 taxes, authorize cancellation of tax certificates outstanding for 1925 taxes, pursuant to Chapter 20981, Laws of Florida, Acts of 1941?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

Chapter 20981, Laws of Florida, Acts of 1941, provides for cancellation of certain tax certificates which were "frozen" by virtue of Chapter 16252, Acts of 1933, as amended by Chapter 17400, Acts of 1935.

It appears that tax certificates representing taxes for 1933, 1934 and 1935 were redeemed May 15, 1939 and taxes of 1932 and 1936 were paid. Under such circumstances the certificate for the year 1925 was not frozen pursuant to Chapter 16252 which required payment prior to July 1, 1937, and was not frozen pursuant to Chapter 17400, as the taxes for 1937 and 1938 were unpaid on June 9, 1939, the date lands were forfeited to the State pursuant to Chapter 18296, Acts of 1937.

It is, therefore, my opinion, under the facts as stated, that the said certificate was not "frozen" and title vested in the State of Florida on June 9, 1939.

August 13, 1943.—043-206.

#### CERTIFICATES PURCHASED BY THE STATE

QUESTION: Under Section 36 of Chapter 22079, Acts of 1943, are tax certificates issued in 1941 for the 1940 taxes to the State Treasurer subject to the provisions of this section in like manner and to the same effect that 1942 certificates which were issued to the county will be when these certificates become two years old?

*To Honorable J. M. Lee, State Comptroller:*

I wish to advise that I have had this question under consideration for some time and I have come to the conclusion that in construing the 1943 Act, particularly Section 36, to which you refer, it is necessary to take into consideration the history of our tax laws. As you know, all certificates prior to the 1941 Act, which is Chapter 20722, were known as "state certificates" although the county had an interest in the certificate and when the same was purchased or redeemed the county received its interest in the certificate in full. More properly, the certificate should have been called "state and county certificate." When we adopted the Constitutional Amendment in 1940 prohibiting the State from levying ad valorem taxes, the State therefore ceased to have any interest in any taxes levied upon real estate after 1940. With this in mind, the 1941 Act that I have referred to, was adopted and tax certificates were thereafter referred to in the Act as "county certificates" even though the State still had an interest in the tax certificates sold in 1941. So the Legislature, in providing for a general system of foreclosure in 1943, by the section of the chapter you have referred to, called these certificates "county certificates" and then provided that all certificates for 1940 taxes which were sold to the State and unredeemed were to be included in the chancery proceedings authorized in the year 1943 to the same effect as if they were owned solely by the county. The interests of the State of Florida in such taxes were to be distributed by the Clerk when the proceeds thereof were available for distribution and payment as provided by the Act.

I think what the Legislature intended was that the county should foreclose tax certificates in 1943, but the Legislature was endeavoring to be careful in preserving to the State of Florida the interest it then had in those certificates and therefore this proviso was inserted with that particular purpose in mind and thus there is no question that when tax certificates in which the State of Florida has an interest are foreclosed by the county, the State is to receive payment of this interest under the provisions of this act.

I therefore now hold that tax certificates issued to the State Treasurer in 1941 for the 1940 taxes are subject to the provisions of this section in like manner and to the same effect that 1942 tax certificates which were issued to the county will be when these certificates become two years old and that the same should be foreclosed in 1943 as provided in the section of this act that is under consideration.

May 25, 1944.—044-154.

#### COUNTY TAX LIENS—FORECLOSURE PROCEEDINGS

QUESTION: Are the provisions of the Soldiers' and Sailors' Relief Act of 1940 applicable to an action instituted by a county under the provisions of Section 36, Chapter 20722, Laws of Florida, Acts of 1941, as amended by Section 13, Chapter 22079, Laws of Florida, Acts of 1943, for the foreclosure of county tax liens upon real estate?

*To Honorable H. M. Stringfellow, Chairman, Board of County Commissioners,  
Lee County, Fort Myers, Florida:*

In this connection I call your attention to Section 560, Title 50, U. S. C. A., wherein it is in part provided that:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption."

It is my opinion that the provisions of the section above quoted are applicable to an action instituted by a county for the foreclosure of its tax liens under the provisions of the Florida Statutes above cited, if the property involved has the character of ownership and possession referred to in said section.

May 12, 1943.—043-111.

#### MURPHY ACT—REDEMPTION OF CERTIFICATES

QUESTION: On August 8, 1938 "A" purchased tax sale certificates No. 1475, sale of August 5, 1929 and No. 3179, sale of September 4, 1933, covering the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of NW $\frac{1}{4}$ , Section 29, Township 32 South, Range 38 East, via the Murphy Act. Said certificates remain outstanding and uncanceled.

On April 29, 1943, "B" purchased tax sale certificates No. 648, sale of August 4, 1941, and No. 1047, sale of July 31, 1942, covering the NE $\frac{1}{4}$  of NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Section 29, Township 32 South, Range 38 East. The question is, can "B" at this time, redeem the certificates purchased by "A" or must he wait until August 4, 1943, at which time he may make application for a tax deed and redeem them at that time? Or will it be possible for him to redeem them at this time and leave them in my custody until August 4, 1943, at which time a tax deed may be applied for?

*To Honorable Douglas Baker, Clerk of the Circuit Court, Indian River County,  
Vero Beach, Florida:*

In reply I wish to advise that I am of the opinion that "B" can redeem the certificates purchased by "A" but if he does so it would be the same thing as if he had paid the taxes and that amount could not

be included in the lien that he would have when he made application for a tax deed in August 1943. So, in fact, if "B" desires to protect himself to the extent that he will get back any money that he puts up to redeem "A's" tax certificates he should wait until he makes application for a tax deed, at which time he will, of course, be required to redeem the tax certificates held by "A".

Ordinarily, as you know, I do not give opinions to anyone except state officers, but knowing that you are having a somewhat difficult time securing opinions in the usual manner, I have made an exception in this instance.

June 25, 1943.—043-146.

#### MURPHY ACT—REVERSION OF COUNTY LANDS TO STATE

**QUESTION:** Do county lands revert to the State where tax certificates were sold subsequent to the acquisition for taxes levied for the year the land was acquired?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

You have requested an opinion as to ownership by the State of Florida of certain lands acquired by Hillsborough County by purchase on July 15, 1937, there being tax certificates sold on the lands in 1928 for 1927 taxes and 1933 for 1932 taxes.

Although the lands were acquired by the county prior to the time of the perfecting of the lien by final assessment of taxes for 1927, our statutes provide for attaching of the lien as of January 1st of the year for which the assessment and levy are made. Consequently when the county acquired the land there was no assessment for 1927 but the proceeding being completed during 1927, the State acquired a valid lien. See *United States v. Alabama*, 313 U. S. 274, 85 L. Ed. 1327. There being certificates outstanding for 1928, the title to land covered by such certificates became vested in the State pursuant to Chapter 18296, Laws of Florida, 1937, and such certificates are not now cancellable, the lien represented by the certificates having merged with the title, certificates for 1933 having been outstanding on said property also.

Although the question of tax exemption might be raised as to the 1933 certificates no exemption may be claimed under the 1928 certificates, but all such certificates might have been cancelled under Sections 194.34, 194.28 or 194.33, Laws of Florida, Acts of 1941, had such action been taken prior to June 9, 1939. However, there being valid certificates outstanding on such date, the land became vested in the State pursuant to Chapter 18296, Laws of Florida, Acts of 1937. (Murphy Act).

You are also advised that the Trustees, by virtue of Chapter 21684, Laws of Florida, 1943, have power to sell the land in question to the county at private sale and without notice.

October 26, 1944.—044-313.

#### SALE OF LANDS—TITLE VESTED IN COUNTY

**QUESTION:** Does the sale mentioned in Section 194.55, as amended by Section 21, Chapter 22079, Laws of Florida, Acts of 1943, refer solely to the public sale to be made by the Clerk of any parcel described in the decree and in no wise have any bearing upon or anything to do with the costs and expenses paid by the county in its suit provided for in Section 36?

*To Honorable Hinton J. Baker, County Attorney, Fernandina, Florida:*

A study of Section 36 indicates that it pertains to the manner in which lands, against which there are tax certificates two years old, vest



in a county after the filing of a bill of complaint by the county, notice to former owners of the property to show cause why the fee simple title should not be decreed to be vested in said county, and subsequent entry of a final decree.

Section 44 provides that, after the Board of County Commissioners has fixed a price of not less than 50 per cent of the amount of the last assessed valuation appearing upon the county tax roll for each parcel of land vesting in the county under Section 36, the Board,

"... shall sell and convey such lands at public sale in the following manner: Any person desiring to purchase any parcel of said land shall deposit with the Clerk of the Circuit Court the amount of his initial bid, which shall be not less than the price as determined by the Board of County Commissioners and recorded in the book marked 'County Lands Acquired for Delinquent Taxes,' plus the estimated cost of advertising the same for public sale, and all fees of the Clerk incident thereto provided by law, ..." (Emphasis supplied).

That after sale,

"... the Clerk of the Circuit Court shall first pay the costs of sale, and the fees of the County Tax Collector, and the Clerk of the Circuit Court, and shall distribute the balance of the proceeds from the sale of the lands to the municipality (if lands are situated in one) and the County, ratably in proportion to the amount of taxes so calculated to be due each. ..."

It is my opinion that the sale referred to in Section 44, the pertinent provisions for which are quoted above, refers to the public sale to be made by the Clerk of county lands acquired for delinquent taxes, and to no other sale, and that from the proceeds of such sale the Clerk shall pay, first, the costs of sale, such as the cost of advertising, and the Clerk's fees and commissions in connection with the application for sale, holding the sale and issuance of and recording the deed; second, the fees of the County Tax Assessor, that is, 2 per cent commission on the taxes subsequent to the year represented by the certificate and which taxes were not extended on the tax roll; third, the fees of the County Tax Collector, which would be the Collector's fees in the face of the tax certificate which was included in the bill of complaint as a basis for the title acquired by the county; and fourth, the fee of the Clerk of the Circuit Court for recording the decree of the court in the book marked "County Lands Acquired for Delinquent Taxes," and other fees not included in the suit brought by the Board of County Commissioners.

## INTANGIBLE PERSONAL PROPERTY TAXATION

December 30, 1944.—044-352.

### DISTRIBUTION OF INTANGIBLE TAX MONEY

**QUESTION:** Should intangible personal property taxes assessed under Chapter 20724, Acts of 1941, but collected after the enactment of Chapter 21943, Acts of 1943, be distributed in accordance with the provisions of the 1941 or of the 1943 Act?

*To Honorable J. M. Lee, State Comptroller:*

Section 33, Chapter 20742, Laws of Florida, Acts of 1941, provided for the distribution of the intangible tax money collected and placed in the State Treasury by the several counties of the State. Section 3, Chapter 21943, Laws of Florida, Acts of 1943, amended Section 33 of the 1941 Act and changed the manner of distribution set out in the 1941 Act.

Section 4 of the 1943 Act provided that "as to Sections 1 and 2 hereof, this Act shall take effect on January 1, 1944, and as to Section 3 hereof, this Act shall take effect upon becoming a law." The said 1943 Act became a law on June 5, 1943.

It is my opinion that the distribution should be made under the 1941 Act as to all intangible taxes assessed and collected on the 1943 roll prior to the fifth day of June, 1943, and the Chapter 21943 would only apply to the distribution of the taxes collected subsequent to that date, this because of the fact that while Section 3 of Chapter 21943 became effective upon the Act becoming a law, which occurred when it was approved by the Governor on June 5, 1943, Sections 1 and 2 did not become effective until January 1, 1944.

June 3, 1943.—043-128.

#### LEGAL RESIDENCE

QUESTION: "A" and "B" have been assessed with intangible tax for the years 1938, 1939, 1940, 1941 and 1942, the assessment being based on a joint Federal Income Tax return and filed by them for the year 1937. "A" claims to be the owner of the intangibles but claims residence in New Jersey. "B" was a resident of Florida many years before her marriage to "A" and still is, but he contends that his marriage does not make him a resident of Florida and therefore, even though he resides here and his wife receives homestead exemption on their home he is not liable for the intangible tax. Is he taxable on his intangibles?

*To Honorable Chas. A. Wilcox, Tax Assessor, Pinellas County, Clearwater, Florida:*

I wish to advise that the mere fact that "A" married a resident of this State would not in and of itself make him a resident of the State of Florida. So, unless you can submit more proof of residence in Florida than just the man's marriage to a resident of Florida, I would be forced to hold that he would not be taxable on his intangibles.

September 19, 1944.—044-275.

#### MANUFACTURING COMPANY AND SUBSIDIARY

QUESTION: A corporation of Cleveland, Ohio, owns and operates a large plant in Duval County, manufacturing wood rosin and turpentine. It also owns a subsidiary company, which manufactures gum turpentine and rosin and its by-products. Part of the manufactured products are sold and billed direct from its Jacksonville office, thereby creating accounts receivable upon their books. When payments are made the funds are transferred immediately to the home office.

Are the company and its subsidiary subject to the intangible tax for the amount of the accounts receivable on their books at the Duval County, Florida branch office?

*To Honorable J. M. Lee, State Comptroller:*

In reply to the foregoing inquiry, I beg leave to state that it is my opinion that the accounts receivable in question are subject to the intangible tax.

The basis of this opinion is the case of *Smith v. Lummus*, 6 So. 2d, 625 and 14 So. 2d, 897, which was a case in which a certain firm sought to enjoin the collection of an intangible tax upon its brokerage accounts in Miami. The attack upon the bill of complaint in this case failed, but when testimony was taken as shown by the latter opinion (14 So. 2d, 897), the tax was sustained upon facts which I feel are very similar and legally identical. The decision in the *Smith-Lummus* case was sought to be reversed by the Supreme Court of the United States, but the effort failed.

I trust that this will be a sufficient reply to your inquiry.

## EXCISE TAXES

July 23, 1943.—043-181.

## CIGARETTE TAX—EXEMPTION

**QUESTION:** Are cigarettes sold to the personnel of the armed forces of the United States Government by civilians operating cigarette vending machines on military reservations exempt from the taxes imposed by Chapter 21946, Acts of 1943, Laws of Florida?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

The pertinent part of Section 2, Chapter 21946, Acts of 1943, "The Cigarette Tax Law," relating to exemptions from payment of this tax, reads as follows:

"... No tax shall be required to be paid upon cigarettes sold to post exchanges or ship service stores for resale to members of the armed services of the United States of America, if such post exchanges or ship service stores are operated under regulations of the United States Army or Navy on military or naval reservations within the State of Florida. . ."

It is clear from the above provision that such exemption applies only to cigarettes sold to members of the armed forces by a post exchange or ship service store and any sale of cigarettes to members of the armed forces, other than by a post exchange or ship service store is subject to the taxes imposed by Chapter 21946, *supra*.

I am, therefore, of the opinion that cigarettes sold on military or naval reservations to members of the armed forces by civilians through the operation of cigarette vending machines or otherwise, are not exempt from the taxes imposed by Chapter 21946, *supra*, and that such sales are only exempt where made by an Army Post Exchange or Navy Ship Service Store, both of which are instrumentalities of the United States Government.

February 21, 1944.—044-68.

## DOCUMENTARY STAMP TAX—BONDS AND MORTGAGES

**QUESTION:** Are documentary stamps required under Chapter 201, Florida Statutes, 1941, to be attached:

1. On both the bonds and mortgage or deed in trust securing them,
2. On the bonds alone, or
3. On the mortgage or deed in trust alone?

*To Honorable J. M. Lee, State Comptroller:*

Investigation discloses that as early as November 4, 1931 opinions were rendered by this office which, while not upon situations in exact accord with the present one are yet, I feel, controlling in determining the questions asked.

1. It is my opinion that it is not necessary to put documentary stamps on both the bonds and mortgage deed of trust.

2. If the bonds are stamped it is sufficient if the documentary stamps are placed upon the bonds and a notation made on the margin of the deed or mortgage reciting the fact that the documentary stamps have been attached to such bonds.

3. It is further my opinion that it is sufficient if the documentary stamps are on the mortgage deed of trust alone.

In an opinion given by my predecessor, the Honorable Cary D. Landis, as Attorney General, to Honorable Don R. McLeod, Jr., Apalachicola, Florida, November 4, 1931, this matter was covered in almost the exact language of my opinion, see page 29, Comptroller's Compilation of Opinions on the Documentary Stamp Tax.

Again in a letter to Public Relations Council, Sarasota, Florida, under date of November 4, 1931, in dealing with the question of whether a chattel mortgage and the notes secured by it should both be stamped, it was the opinion of Attorney General Landis that the note should be stamped but the mortgage need not be, with which and the former opinion, I concur. (See page 864).

December 6, 1944.—044-356.

#### DOCUMENTARY STAMP TAX—SURETY BONDS

**QUESTION:** Are the bonds required by law of licensees of the Florida State Racing Commission (Section 550.15, Florida Statutes, 1941), and those required of fire insurance companies (Section 631.06, Florida Statutes, 1941), and bonds of similar character, "written obligations to pay money" within the meaning of Section 201.08, Florida Statutes, 1941, and subject to documentary stamp tax?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

You refer to an opinion of this office dated July 25, 1944 in which it was stated that a forthcoming bond was an "obligation to pay money" within the Documentary Stamp Tax Law, and that surety bonds, appearance bonds and supersedeas bonds for Criminal Courts of Record are all "obligations to pay money" within the meaning of such Law, and that documentary stamps should be affixed to said bonds.

The part of the Documentary Excise Tax Law (Chapter 201, Florida Statutes, 1941) here relevant is Section 201.08, the pertinent part of which is quoted as follows:

**"Tax on promissory notes, written obligations to pay money, assignments of wages, etc.—On promissory notes, nonnegotiable notes, written obligations to pay money, assignment of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida. . ."**

The phrase "written obligations to pay money" must be construed ejusdem generis in relation to the class of obligations in the law preceding it, viz., promissory notes and nonnegotiable notes. *Banker's Trust Company v. Florida East Coast Railway Co.*, 8 Fed. Supp. 874; *Metropolis Publishing Co., et al., v. Lee, Comptroller*, 170 So. 442. Such preceding obligations contemplate unconditional written promises to pay money.

In statutes of this nature "an obligation to pay money" refers to a direct written promise to pay a stated sum and not to a duty to pay a sum that may be established by resort to extrinsic facts. *Lee, Comptroller, v. Kenan, et al. Receivers for F. E. C. Ry. Co.*, 78 F. 2d. 425, 100 A.L.R. 869 (petition for certiorari denied by Supreme Court, 56 S. Ct. 170). *City of Philadelphia v. Goldfine*, 29 A. 2d. 233; *Metropolis Publishing Co. v. Lee, supra*.

This is a taxing statute with penal provisions, and the rule is that such statute should be strictly construed and all doubts or ambiguities resolved in favor of the taxpayer. *Metropolis Publishing Co. v. Lee, supra*; *U. S. v. Isham*, 21 L. Ed. 728.

Surety bonds of the nature of those contemplated by the above question are to insure the doing of certain things required by the condition of such bonds. Such a bond promises to pay a sum only in the event of the happening of a named contingency. To ascertain if money is payable under a bond of this nature, and to ascertain the amount payable if a condition is breached, one is required to go beyond the four corners of the instrument and rely on proof of facts outside the instrument itself.



In my opinion the above question is properly answered in the negative.

The aforesaid opinion of July 25, 1944, is amended to the extent that such former opinion is at variance with the above.

July 13, 1943.—043-163.

DOCUMENTARY STAMP TAX—DEEDS AND CONTRACTS  
BY STATE AGENCY

QUESTION: Are deeds and contracts of the Trustees of the Internal Improvement Fund subject to documentary tax imposed by Chapter 201, Florida Statutes, 1941?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

It is my opinion that the Trustees of the Internal Improvement Fund, a state agency, is exempt from the provisions of the documentary stamp tax act imposed by Chapter 201, Florida Statutes, 1941, as the statute is not broad enough to waive the implied immunity of the state or its agencies from taxation. Deeds issued by the Trustees of the Internal Improvement Fund are not subject to the tax. However, contracts to pay money to the said Trustees made by one, not otherwise exempt, would fall within the provisions of Section 201.08 and would be subject to the tax, due not from such Trustees, but from the maker agreeing to pay the Trustees. This construction of the statute places no tax or burden of the tax on the State or any agency of the State.

March 31, 1944.—044-113.

DOCUMENTARY STAMP TAX—DEEDS TO AND FROM STATE

QUESTION: 1. Are State or Federal Documentary Stamps required on deeds given by the Trustees of the Internal Improvement Fund?

2. Are State or Federal Documentary Stamps required on deeds given by private corporations to the Trustees of the Internal Improvement Fund?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

On July 13, 1943, I advised you that the Trustees of the Internal Improvement Fund are exempt from the provisions of the State Documentary Stamp Act (Chapter 201, Florida Statutes, 1941), as the statute is not broad enough to waive the implied immunity of the State or its agencies from taxation.

I now reaffirm that opinion, and further advise you that the Trustees of the Internal Improvement Fund are exempt from the provisions of Federal Law relating to documentary stamps required on deeds. (See Title 26, Paragraph 801, U. S. Code Annotated, providing specific exemption to states).

It is therefore my opinion that the Trustees of the Internal Improvement Fund are not required to attach either State or Federal Documentary Stamps to deeds executed by them.

In answer to your second question, I beg to advise that State and Federal Documentary Stamps are required to be attached to deeds given by private individuals to the Trustees of the Internal Improvement Fund. The sole question is the amount of the taxes. Where the consideration is not stated, Chapter 201.02, Florida Statutes, 1941, provides:

"That when the full amount of the consideration for the execution, assignment transfer, or conveyance, is not shown in the face of such deed, instrument, document, or writing, then in such event the tax shall be at the rate of ten cents for each one hundred dollars, or fractional part thereof, of the consideration therefor."

It is therefore a matter of practical determination of what the deed is worth and then affixing the stamps accordingly. Under the Federal Law the stamps are to be used on the basis of the consideration and value of the interest of the property conveyed. The same rule of practical determination is to apply there.

It is therefore my opinion that a deed from a private individual or corporation to the Trustees of the Internal Improvement Fund is required to have attached State Documentary Stamps and Federal Documentary Stamps if the consideration or interest conveyed is sufficient, and that the amount of tax should be determined on a practical basis of the value of the interest conveyed, where the deed does not show the monetary consideration on its face.

June 12, 1944.—044-174.

#### DOCUMENTARY STAMP TAX—FOREIGN CONTRACTS

**QUESTION:** Where a purchase contract or agreement, made and executed in another state, is brought into this state by the seller, is such contract or agreement subject to the Florida Documentary Stamp Tax and should its owner be required to attach stamps at the rate of 10c for each \$100.00 or fractional part thereof of the balance due?

*To Honorable J. M. Lee, State Comptroller:*

It appears from the request for an opinion that a certain corporation sold merchandise under agreement or contract through stores located outside of the State of Florida, from which stores the merchandise was delivered to the purchaser.

Subsequently, the purchaser moved to Florida, and as an accommodation to the purchaser and also to facilitate collection of the unpaid balance, the said contract or agreement was forwarded to one of the corporation's Florida stores for collection of the unpaid balance.

In reply to the above question, in the light of the above facts, it is my opinion that these transactions, not being Florida transactions, even after the agreement is forwarded to one of the corporation's Florida stores for collection, do not require documentary stamps and that such tax need not be paid upon the balance due at the time they were brought into Florida.

April 24, 1944.—044-132.

#### DOCUMENTARY STAMP TAX—FOREIGN CORPORATIONS; ESTATES

**QUESTION:** Are documentary stamps required on stock in foreign corporations transferred to legatees by the personal representative of an estate being administered in the State of Florida?

*To Honorable J. M. Lee, State Comptroller:*

It would appear that the stock in question when transferred on the books of the corporation is to be delivered to a legatee (residence not stated) by the representative of an estate being administered in the State of Florida.

Under the foregoing circumstances it is my opinion that documentary stamps are necessary.

In this connection see the opinion of February 5, 1932 to Honorable J. E. Stephenson, Vice-President, Atlantic National Bank, Jacksonville, Florida, pages 43-44 of the Comptroller's compilation of the Attorney General's opinions in reference to documentary stamp tax. See also the opinion dated August 20, 1932 to Honorable H. Pierre Branning, First Trust Building, Miami, Florida, Comptroller's compilation, page 51.

July 25, 1944.—044-212.

#### DOCUMENTARY STAMP TAX—FORTHCOMING BONDS

**QUESTION:** Does Chapter 201, Florida Statutes, 1941, require that State Documentary Stamps be placed on forthcoming bonds?

*To Honorable J. M. Lee, State Comptroller:*

In an opinion to Honorable George F. McCall, Clerk of Criminal Court of Record, Miami, Florida, dated October 23, 1931, as shown on page 44 of the Comptroller's Compilation of Opinions of the Attorney General, I find that my predecessor has advised that surety bonds, appearance bonds and supersedeas bonds for the Criminal Court of Record are all obligations to pay money and come within Section 1, Chapter 15787, Acts of 1931, which is the present Documentary Stamp Tax Act. Documentary stamps should be affixed to said bonds.

On pages 74 and 75 of the compilation appears an opinion dated April 9, 1936 to the Comptroller in which a similar opinion is expressed, and this opinion refers to a previous opinion of August 26, 1932, which does not appear to be indexed.

It is my opinion that a forthcoming bond is to all intents and purposes a promise to pay money upon the happening of the condition mentioned in the bond and that such bond requires appropriate documentary stamps.

May 26, 1943.—043-115.

#### DOCUMENTARY STAMP TAX—PARTIAL ASSIGNMENT OF MORTGAGE

**QUESTION:** Should documentary stamps be placed on a partial assignment of mortgage where the original mortgage bears the proper amount of documentary stamps?

*To Honorable Jack L. Meeks, Clerk of the Circuit Court, Levy County, Bronson, Florida:*

I wish to advise that in a test case, *State vs. Sweat*, 152 So. 432, that went up in Duval County, Florida, the Supreme Court said that the assignment would not be taxable "unless the mortgage assigned is one which incorporates the certificates of indebtedness not otherwise shown in a separate instance."

May 16, 1944.—044-148.

#### DOCUMENTARY STAMP TAX—TIRE SALES CONTRACTS

**QUESTION:** What is the proper formula for determining the amount of documentary stamp tax payable upon agreements for the sale of motor vehicle tires, where the consideration payable under such agreement is dependent upon the number of tires to be sold, and is payable from time to time at regular periods?

*To Honorable J. M. Lee, State Comptroller:*

From the request for an opinion it appears that the agreement is unilateral and provides for the sale of motor vehicle tires. The purchase price of the tires seems to be payable after the sale of said tires and its amount is made dependent upon the number of tires sold. The number of tires to be sold under the agreement cannot be determined at this time. The agreement appears to be taxable under Section 201.08, Florida Statutes, 1941, at the rate of ten cents on each one hundred dollars of the

consideration thereof. This amount cannot be determined until after the sales are made.

Whenever tires are sold under the agreement, totaling one hundred dollars, a stamp tax in the sum of ten cents becomes due and payable thereon, and stamps in said sum should be affixed to the said agreement. Additional stamps should be affixed to the agreement for each subsequent one hundred dollars' worth of tires sold under the agreement as and when such additional sums accrue thereunder.

This is a formula which presents difficulties of inspection and may necessitate the examination of the agreements made or even the books of the company.

When we reflect that the absence of sufficient stamps might invalidate the entire instrument, applications for leave to inspect will meet with ready acquiescence.

August 17, 1944.—044-244.

#### DOCUMENTARY STAMP TAX—TRANSFERRED STOCK

QUESTION: Are documentary stamps required on stock transferred pursuant to corporate consolidation?

*To Honorable J. M. Lee, State Comptroller:*

It appears that "A" Trust Company of Detroit, Michigan, as Trustee, held 867 shares of common stock of a certain lumber company, an Alabama corporation with headquarters in Florida.

Under date of February 17, 1943, the "A" Trust Company consolidated with "B" Trust Company of Detroit, Michigan.

Under date of March 31, 1944, the above mentioned 867 shares were sent to the lumber company for transfer from "A" Trust Company. The certificates were accompanied by a separate assignment, duly executed, assigning the shares for transfer into the name of "B" Trust Company, Trustee, under agreement dated November 1, 1916.

"A" Trust Company is now known as "B" Trust Company. "B" Trust Company sent a tax waiver with the certificates in accordance with the Internal Revenue Code under Section 1802 (c) waiving the tax on a transfer from the former Trustee to the succeeding Trustee under the same trust agreement.

In my opinion the transaction described has to do with stock transfers subject to the documentary stamp tax as required to be paid by Section 201.04, Florida Statutes, 1941.

#### LICENSE TAXES

December 10, 1943.—043-332.

#### CHAIN STORES—ADDITIONAL LICENSE TAXES

QUESTION: 1. A corporation operates two stores and procured 1942-43 and 1943-44 Class Two licenses for each store, the second store having begun operations during the 1942-43 license year. A 1941-42 Class One license was issued for the original store. It now develops that another corporation procuring Class One store licenses for the 1941-42 and 1942-43 license years was under the control of the person who is president of both corporations, and should have been reported by the corporations as a chain of two stores in 1941-42 and as a chain of three stores in 1942-43 and 1943-44. Not having done this the result was that through the misrepresentation of these corporations the State was defrauded of the proper license tax.



Under the above statute can additional license taxes be collected for the 1941-42 license year for the first above mentioned corporation, and can additional license taxes be collected for the second above mentioned corporation for the 1941-42 and 1942-43 license years? The 1943-44 store license for the second corporation has not been issued, although it has been applied for.

2. A partnership operates a store which procured Class One 1941-42 and 1942-43 store licenses. Another partnership operated a store of the same kind and procured 1941-42 and 1942-43 store licenses. It now develops that one of the partners of the first mentioned store, who supervises the operation of the business, also is a partner in the second store and controls the majority interest therein, and as a result of this misrepresentation the State was defrauded of the proper license tax.

Can additional license taxes be collected for the 1941-42 and 1942-43 license years? Class One license for the 1943-44 license year has been applied for by each store, but has not been issued.

Can additional license taxes for the 1941-42 and 1942-43 license years be collected, as well as additional license taxes for the 1943-44 license year?

3. The licenses for 1941-42, 1942-43 and 1943-44 license years have been issued to the operator of a store and it now develops that improper inventory valuations have been reported for each of the three license years and additional inventory license taxes are due for each of the three years, and as a result of this misrepresentation the State did not receive the proper inventory tax.

Can additional inventory taxes, based upon correct inventory valuation, be collected for these three license years? If not, for what years can they be collected?

4. The licenses for 1941-42 and 1942-43 license years have been issued to the operator of a store but the license for the year 1943-44 has not been issued. It now develops that improper inventory valuations have been reported for each of the three license years and additional inventory license taxes are due for each of the three years, and as a result of this misrepresentation the State did not receive the proper inventory tax.

Can additional license taxes be collected for 1941-42 and 1942-43 license years, as well as for 1943-44 license year?

*To Honorable J. M. Lee, State Comptroller:*

I beg leave to state that in the light of the discussion and explanation of these inquiries had with your Messrs. Chance, Tribble and Waterman, it appears that one answer will suffice for all four of these inquiries.

It is my opinion that in Sections 204.07 and 205.12, Florida Statutes, 1941, are found restrictions and limitations placed by the Legislature upon the collection of back taxes that are applicable when the time involved in the uncollected licenses comes within the time provisions of these two statutes, with this one proviso, that if the time factors involved in the three cases set up by you do not bring these three cases within the purview of Sections 204.07 and 205.12, Florida Statutes, 1941, then in such case the provisions of Section 95.11, Subsection 5, Paragraph (d), might apply, and the State might have and be entitled to claim the benefit of the provisions of this Paragraph (d) which are as follows:

"(d) An action for relief on the ground of fraud the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

A claim under this Section 95.11, Subsection 5, Paragraph (d), has to be brought in three years.

It must be understood that the benefit of this law (Section 95.11, Subsection 5, Paragraph (d)) will not accrue except in those cases where the

Comptroller was without notice or knowledge of the fraud practiced by the licensees and could not with reasonable diligence have discovered the same.

It occurs to me to observe further that any action brought under this last referred to statute would probably have to take the form of a chancery suit brought for the recovery of the amount of damage suffered by the fraud practiced.

July 10, 1944.—044-203.

#### CIGARETTE PERMIT FEE—VETERANS

**QUESTION:** Are disabled veterans exempt from paying for permits to sell cigarettes, provided the total license tax does not exceed fifty (\$50.00) dollars?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

In answering your question, it is assumed that you refer to the cigarette permit required under Section 14, Chapter 21946, Laws of Florida, 1943, (Section 210.14, 1943 Supplement to Florida Statutes, 1941) the applicable part of which reads as follows:

"At the time of making such application, the applicant shall pay to the Director a cigarette permit fee of One Dollar (\$1.00) for each permit. This shall be in addition to any license or other tax prescribed by law."

A consideration of the title to Chapter 17476, Laws of Florida, 1935, (now Section 205.16, Florida Statutes, 1941), together with a study of the provisions of that law, by which a disabled veteran shall "be granted a license to engage in any business or occupation in the State of Florida" exempt from the payment of certain license taxes, indicates that it was intended to exempt disabled veterans from the payment of an occupational tax, which is a tax levied to raise revenue for state or county purposes. The disposition of the funds realized from the aforesaid cigarette permit fee is provided for in Section 17, Chapter 21946, Laws of Florida, 1943, wherein it is required that such fees shall be paid into the State Treasury in a special fund to be designated the Cigarette Tax Administration Fund to the account of the Director, and subject to the payment by him of "his actual expenses incident to the administration of this Act." In other words, the revenue raised by the cigarette permit fees is to be used to defray the costs of administering the Act.

Section 35 of Chapter 20956, Laws of Florida, Acts of 1941, (Section 205.13, Florida Statutes, 1941), an Act relating to occupational license taxes, provides that:

"Other license taxes to be in addition to occupational license tax.—Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational licenses tax required by this chapter or other law unless otherwise expressly provided by law."

It will be noted that instead of expressly providing otherwise, Section 14, Chapter 21946, Laws of Florida, 1943, states specifically that the cigarette permit fee is in addition to any license or other tax prescribed by law.

In view of the foregoing, it is my opinion that disabled veterans who make application for a cigarette permit must pay the required permit fee, and in reaching this conclusion it would seem that the question of the total license tax is beside the point.

January 10, 1944.—044-61.

### CIRCUSES, TRAVELING SHOWS, TENT SHOWS, SIDE SHOWS

**QUESTION:** What licenses are required in this state of traveling shows which exhibit, in tents, oversize, and other animals, for a consideration, moving from place to place by truck?

*To Honorable J. M. Lee, State Comptroller:*

The answer to your inquiry is, in my opinion, ruled by Section 205.32, Florida Statutes, 1941, which contains the following:

"... tent shows, etc., license taxes side shows.—Shows of all kinds, including circuses, vaudeville, minstrels, theatrical, or any exhibition giving performances under tents or temporary structures of any kind, whether such tents or temporary structures are covered or uncovered, shall pay a state license tax for each day as follows:"

You are advised that if there are no loud-speakers, performances, or ballyhoo, it is my opinion that the show does not fall within the definition of those affected by Section 205.32, Florida Statutes, 1941.

The term "exhibition" which is used in the statute is modified so as to read "exhibition giving performances."

In this aspect the word "performance" is defined to be "public entertainment or exhibition of skill," whereas, "exhibition" is a broader term covering "any public show, a display of works of art or feats of skill . . . a display or show where the display itself is the chief object."

In view of this distinction between the two terms it appears that it was the legislative intent to exclude mere exhibition where no performances were given.

October 28, 1943.—043-287.

### INSURANCE—DEDUCTION FOR DIRECT PAYMENT

**QUESTION:** Did the Gross Premium Tax Law in force in this state in 1940 expressly or impliedly prohibit the deduction from the taxable premium receipts of an allowance to policyholders for direct remittance to the company?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 19501, Acts of 1930, was in force in 1940 and provided that the premium tax should be calculated "upon gross premiums received, omitting premiums on reinsurance accepted, and less return premium and cancellations, but without deductions for reinsurance ceded to other companies."

The foregoing law was "clarified" by the 1941 Legislature, which clarification now appears as Section 205.43, Florida Statutes, 1941. The law as so "clarified" provides that the premium tax shall be calculated "upon gross premiums received, omitting premiums on reinsurance accepted, and less return premiums, but without deductions for reinsurance ceded to other companies, and without deductions for monies paid upon surrender of policies for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of premiums, and without deductions on account of dividends of any nature or amount paid, credited or allowed to policyholders."

We have previously rendered an opinion to you in which we held that the above clarification added nothing to the law but merely stated what the law was all the time.

It has previously been contended that insurance companies were entitled to deduct from the taxable premium the amounts paid by life insurance companies to policyholders as the cash surrender values on such policies. The 1939 Act was silent in that regard, just as it was silent with reference to the allowances to policyholders for direct remittance of premiums to the company. Our Supreme Court, however, has ruled that under the 1939 Act no deduction could be made from the taxable premium for the amounts paid as cash surrender values.

Section 635.02, Florida Statutes, 1941, which was in effect in 1940 as Section 6225 C. G. L., provides that no life insurer shall make or permit any distinction or discrimination between insureds of the same class and equal expectation of life as to the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes. However, there are certain exceptions to the foregoing provision against discrimination, which exceptions are found in Section 635.05, Florida Statutes, 1941, which provides that nothing in Section 635.02, supra, shall be construed as prohibiting any insurer from returning to policyholders who have made premium payments, for a period of at least one year, directly to the insurer at its home or district office, a percentage of the premium which the insurer would have paid for the weekly collection of such premiums.

The provision of the statute just referred to is the authority for making the 10 per cent allowance to policyholders referred to in your request for opinion, and based upon the statutory exception just noted, it appears to be quite clear that such an allowance is not to be considered as return premiums, but in fact is actually a part of the operating costs of the company, because it takes the place of the expenses which the company would incur in making the weekly collections if they were not paid direct. Therefore, the gross premium would include such allowances.

It is my opinion that the Gross Premium Tax Calculation Statute in force in 1940 prohibited the deduction from the taxable premium receipts of all allowances to policyholders for direct remittance to the company.

January 12, 1944.—044-18.

#### INSURANCE—GROSS PREMIUM TAX

**QUESTION:** Is the gross premium tax imposed by Section 205.43, Florida Statutes, 1941, applicable to a contract such as the one between a Casualty Corporation and a Shipbuilding Corporation?

2. Would the fact that the Shipbuilding Corporation is called upon as a self insurer to contribute its pro rata share to the Workmen's Compensation Administrative Fund, affect the Casualty Corporation's liability for gross premium tax on the aforesaid indemnity contract?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 205.43, Florida Statutes, 1941, provides in substance, among other things, that every person engaged in insuring against indemnity and insuring employers against liabilities for accidents to employees, shall annually on or before the first day of March in each year pay to the State Treasurer two per cent of the gross amount of receipts of premiums from policyholders and indemnity contracts in this state, and that in calculating such gross receipts, such persons may omit premiums on reinsurance accepted.

The said indemnity contract, in my opinion, comes squarely within the provisions of the foregoing Gross Premium Tax Statute. However, I believe that the Casualty Corporation should be allowed to deduct the premiums on this contract in calculating its gross premiums, for the reasons hereinafter set forth.



Section 440.51 (1) (b), Florida Statutes, 1941, provides that the total expense of administering the Workmen's Compensation Act shall be prorated among the insurance companies writing compensation insurance in the State and self insurers. The gross earned premiums collected by the companies and the amount of premiums a self insurer would have to pay if insured are the basis for computing the amount to be assessed.

Section 440.51 (5), Florida Statutes, 1941, provides that any amount so assessed against and paid by an insurance carrier shall be allowed as a deduction against the amount of any other tax levied by the State of Florida upon the premiums, assessments, deposits, contracts or policies of such insurance carrier.

The Shipbuilding Corporation under the contract appears to be a self insurer and subject to assessment for the benefit of the Administrative Fund of the Workmen's Compensation Division of the Florida Industrial Commission under Section 440.51, *supra*. However, Subparagraph J of Paragraph 7, page 4 of said contract, provides that the premium tax as required of a self insurer as provided in the Florida Workmen's Compensation Act is to be paid by the employer (said Shipbuilding Corporation). The Casualty Corporation will, upon being furnished with proper evidence of said payment, reimburse the employer for said tax.

If the indemnity contract involved here were an insurance contract wherein the employer was insured against liability for accidents to its employees, and the employer were not a self insurer, then the pro rata assessment for the benefit of the Workmen's Compensation Administrative Fund would be made against the carrier (said Casualty Corporation) rather than the self insurer (the Shipbuilding Corporation).

It seems to me that the contract here involved should be construed as reinsurance and therefore the premiums thereon omitted from the gross premium calculations of the carrier under Section 205.43, *supra*, or else the Casualty Corporation should be construed as paying the pro rata contribution or assessment to the Workmen's Compensation Administrative Fund vicariously, that is, through the Shipbuilding Corporation as self insurer, in which event the Casualty Corporation would be entitled under Section 440.51 (5) to deduct such contribution or assessment from its gross premium taxes under Section 205.43. We do not believe that the Legislature intended to collect assessments from the self insurer and at the same time collect a gross premium tax from a carrier which contracts to indemnify the employer against loss.

November 21, 1944.—044-325.

#### ORDINANCE REQUIRING CITY LICENSE FOR GROWER TO RETAIL OWN PRODUCE—VALIDITY

**QUESTION:** Is an ordinance valid which requires the purchase of a city license before a grower retails his own produce?

*To Honorable Spessard L. Holland, Governor:*

In reply to this inquiry I quote from Section 205.17, Florida Statutes, 1941, as follows:

"(1) All farm and grove products and products manufactured therefrom, except intoxicating liquors, wine, or beer, shall be exempt from all forms of license tax, state, county and municipal when the same is being offered for sale or sold by the farmer or grower producing the said products."

Upon the basis of the foregoing quotation, I beg leave to state that it is my opinion that an attempt of the municipality of Winter Garden to require such a license is invalid and unenforceable.

I trust that the foregoing provides you with an adequate reply to your inquiry.

January 12, 1944.—044-12.

#### SIDE SHOW—FREAKS

**QUESTION:** Is a license required to operate a freak show, or an exhibition of freaks, for which an admission is charged and which exhibition is operated in connection with another business which has been licensed?

*To Honorable J. M. Lee, State Comptroller:*

For your information I beg leave to state that it is my opinion that the show in question is subject to the side show license provided for in Section 205.32, Florida Statutes, 1941, the applicable part of which reads as follows:

"Provided that any of the shows mentioned in this section which have paid a license according to the charge for admission and population of the city or town in or adjacent to, as provided in this section, shall be allowed to operate a 'side show' upon the payment of the following license . . ."

#### GASOLINE TAXES

October 9, 1943.—043-267.

#### AVIATION GASOLINE USED IN MOTOR BOATS—TAXABILITY

**QUESTION:** Is aviation motor fuel testing 78 Octane Number (A. S. T. M. Method D-357-33T) or higher, sold by dealers to customers for use in an airplane engine installed in a boat, subject to the State Gasoline Tax of 7¢ per gallon?

*To Honorable J. M. Lee, State Comptroller:*

I wish to advise that the exemption for aviation motor fuel from taxation was granted by Chapter 16789, Acts of 1935, which later became Section 208.05, Florida Statutes, 1941. You will note from this act that the Legislature granted this exemption for the purpose of promoting air transportation between Florida and the North and that, "... it being for the general welfare of the citizens of the State of Florida to further promote aviation in general and systems of air transportation and further encourage a system of development of aerial defense for the State of Florida." I can see no connection whatsoever between this and an airplane engine used in a boat. As a matter of fact I am of the opinion when an engine is used in any particular type of vehicle, that it loses its character as a motor for any particular type vehicle and it would be more proper to call this a boat engine rather than an airplane engine as it is used in a boat. Nevertheless, it certainly was not the intention of the Legislature to grant the exemption to the motor, as it clearly appears that the exemption was granted for the purpose of encouraging a particular use of the motor, and boats are not covered.

I am, therefore, of the opinion that you should collect the tax involved.

January 23, 1943.—043-29.

#### GOVERNMENTAL AGENCIES—EXEMPTION

**QUESTION:** Are governmental agencies required to pay the dealer's price on gasoline, including gas tax, and motor vehicle license fees?

*To Honorable Thomas A. Johnson, Chairman, State Road Department:*

Section 320.10, Florida Statutes, 1941, provides an exception to Sections 320.08 and 320.09, the last two sections requiring payment of license fees to be paid for registration of motor vehicles. The exemption is as follows:

"The provisions of sections 320.08 and 320.09 shall not apply to any motor vehicle, trailer or semi-trailer owned and operated by the

federal government. Neither shall the provisions of said section apply to any motor truck, trailer or semi-trailer owned and operated by the State of Florida or any county or municipality of the State of Florida, including public school authorities . . ."

It is, therefore, my opinion that the Federal Government is not liable for a motor vehicle license fee on motor vehicles, trailers or semi-trailers owned and operated by it, nor is the State of Florida, or any county or municipality of the State, liable for license fees under said sections for any motor truck, trailer or semi-trailer owned or operated by them. However, such vehicles, except those owned and operated by the Federal Government, are, by said Section 320.10, required to carry a number plate furnished by the Motor Vehicle Commissioner upon the payment of \$2.00 each.

As to the gasoline tax, I beg to advise that as far as the State of Florida is concerned, the question has been covered in my opinion of October 23, 1942.

Chapter 207, Florida Statutes, 1941, provides for the payment of motor fuel tax by distributors or dealers, and Chapter 20303, Laws of Florida, Acts of 1941, provides for a gasoline tax of six cents (6¢) per gallon to be paid by dealers and the apportionment to outstanding bonds issued for road construction, maintenance of roads and new construction.

Section 208.44, Florida Statutes, 1941, provides for an additional one cent (1¢) tax per gallon.

Under the provisions of the above and other laws of this state, the tax on the sale of gasoline is an excise tax on the privilege of selling gasoline exacted from the dealer, even though ultimately paid by the purchaser, occasioned by the dealer's adding the tax to the price of such gasoline (*Orange State Oil Company vs. Amos*, 130 So. 707 Fla.).

Chapter 18298, Laws of Florida, Acts of 1937, was combined with Section 1 of Chapter 15659, Laws of Florida, Acts of 1931 and re-enacted as Section 208.04, Florida Statutes, 1941. Chapter 20303, Laws of Florida, Acts of 1941, re-enacted the six cent (6¢) gas tax. Although Section 208.04 refers to this six cent (6¢) tax as a tax on the consumer, a consideration of all sections thereof shows no intent of the Legislature to consider this tax other than an excise tax on the dealer. A careful consideration of these laws shows a legislative intention to recognize the custom of the dealer to add the tax to the price of gasoline sold to the consumer. The Supreme Court has, in considering this tax since the 1937 Amendment, recognized the six cent (6¢) tax as a dealer tax. See *Standard Oil Co. vs. Lee*, 199 So. 325. The emergency one cent (1¢) tax levied by Section 208.44, Florida Statutes, 1941, is expressly made an excise tax on the dealer and Section 208.04 has no application thereto.

Gasoline purchased from dealers or distributors in this state is not tax free because of an implied or statutory immunity from taxation of the purchaser, the tax being chargeable, in the first instance, to the distributor or dealer. The cases of *Panhandle Oil Company vs. Knox*, 277 U. S. 218, 72 L. Ed. 857, and *Graves vs. Texas Company*, 298 U. S. 393, 80 L. Ed. 1236, are contra to this position, but such cases have been modified by *State of Alabama vs. King & Boozer*, 86 L. Ed. 1 and *Curry vs. United States*, 86 L. Ed. 6. The Supreme Court of the United States now holds that such cases are overruled insofar as they hold "a tax, the economic burden of which falls upon the federal government, may not constitutionally be imposed by a state." See also *Standard Oil Company vs. Lee*, 199 So. 325 and *Standard Oil Company vs. Fontenot*, 4 So. 2d. 624 (La.). These last two cases applied to contractors with the federal government.

The imposition of an excise tax on gasoline dealers is a tax on the dealer rather than on the consumer and on the privilege of delivering or distributing gasoline (*Orange State Oil Company vs. Amos*, supra). The fact that the tax is added to the price of gasoline sold by such dealer to the

United States is not a tax on the government itself but is a tax on the dealer although a burden falling on the United States government is, nevertheless, permitted by the Constitution. This also applies to municipalities whose property is exempt by the laws of this state from taxation who, nevertheless, have been required to pay the tax added by the dealer as a "dealer tax" (see *Orange State Oil Co. vs. Amos*, supra, also *Sheip Co. vs. Amos*, 130 So. 699; *West Palm Beach vs. Amos*, 130 So. 710). For many years the counties, cities and the State of Florida have recognized the dealer tax on gasoline but no demand has ever been made on the Federal Government in this state.

The very economic structure of this state rests on this six cent (6¢) tax and the additional one cent (1¢) emergency gas tax. Only ½¢ is imposed for the purpose of raising general revenue, the remainder is devoted to the payment of road construction, the building and repair of roads, and education. As such it relieves our citizens of public burdens they would otherwise be called upon to share. In normal times this main support of our economic life was secure. The fortunes of war have diverted motor fuels to the machines of war and war production. Peaceful pursuits are materially restricted and the military forces and those engaged in war production now use the gasoline and the highways of the State. There is an imperative necessity that all users bear the dealer tax.

It is, therefore, my opinion that the Federal Government and municipalities are not entitled to be relieved of paying the resulting increases in price of gasoline on purchase of gasoline from dealers or agents in the State of Florida (except tax-exempt aviation gasoline) but, on the contrary, must pay the dealer's price which includes the gasoline tax.

### FINANCIAL MATTERS, GENERALLY

January 25, 1944.—044-36.

#### SPECIAL FUNDS—CIGARETTE TAX COLLECTIONS

QUESTION: 1. Under the present laws is it required that I, as Director of this Department, turn over to the General Revenue Fund of the State, for the State's general operating purposes, three per cent of the tax collections under Chapter 21946, Laws of Florida, Acts of 1943, which is the Cigarette Tax Act?

2. Also, is it your opinion that the Governor has the authority to reduce the three per cent that may be levied by the law to a lesser percentage if he deems advisable?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

I call your attention to the provisions of Section 215.20, Florida Statutes, 1941, wherein it is provided that:

"A deduction of three per cent shall be made from all State funds, termed Special Funds, and other funds, the source of which is not the General Revenue Fund or funds which become a part of the General Revenue Fund, of any State Department, Institution, Board, Agency, Division or Commission, which is deposited by or through the office of the Comptroller or the State Treasurer. The deduction shall be based on the total sum collected for such fund or deposited with the State Comptroller or the State Treasurer." (Emphasis supplied).

It is my opinion that any special fund that has as its source the General Revenue Fund, or any special fund that is required by law to be paid into and become a part of the General Revenue Fund, does not come within the provisions of the section above quoted.



By the provisions of Chapter 21946, Acts of 1943, a tax is levied and imposed on cigarettes. Applicants for a permit to engage in the business of selling cigarettes in this state are required to obtain a cigarette permit for which a fee of \$1 must be paid. Section 17 of said Chapter provides that such permit fees shall be paid into the State Treasury in a special fund to be designated Cigarette Tax Administration Fund and that such Fund shall be used for the payment of expenses incident to the administration of the Act. Any excess in such Fund over 10 per cent is, at the end of each year of the administration of the Act, paid into the General Revenue Fund. All cigarette tax collections are paid into a fund in the State Treasury designated Cigarette Tax Collection Fund. If the Cigarette Tax Administration Fund is insufficient to pay such expenses, a sum not to exceed three per cent of the total collections of such cigarette taxes in any year may be transferred to such fund from the Cigarette Tax Collection Fund. All of the Cigarette Tax Collection Fund, less the sum transferred to the Cigarette Tax Administration Fund is transferred from month to month to the General Revenue Fund.

It appears, therefore, that all cigarette tax and permit funds received under the provisions of Chapter 21946, *supra*, less the sum required to pay the expenses of administering the law, and the reserve created for such purpose, become a part of the General Revenue Fund. Therefore, in my opinion, the first question posed by you should be, and the same is answered in the negative.

The answer to the first question disposes of the second question you have posed, and my answer to same is that the Governor does not have such authority.

March 13, 1943.—043-74.

#### STATE AND POLITICAL SUBDIVISIONS—INVESTMENTS

**QUESTION:** Have the State of Florida and its political subdivisions authority to invest any excess or idle funds in their treasuries or depositories?

*To Honorable Spessard L. Holland, Governor:*

I have made an investigation, and I do not find any law relating to excess funds or idle funds as such, with regard to how same may be invested.

As you know, we do have a statute, Section 518.01, Florida Statutes, 1941, providing for investment of funds held by Trustees, which, of course, permits investment in United States Government obligations. I think probably some municipal corporations as well as some boards do have authority to invest sinking funds for the payment of certain funded obligations, but, of course, no fund held either by Trustees or by the board with such authority would be considered as excess or idle funds.

November 10, 1944.—044-318.

#### STATE BOARD OF BEAUTY CULTURE—TRANSFER OF FUNDS

**QUESTION:** May funds be repaid to the statutory State Board of Beauty Culture Fund which were temporarily transferred to the General Revenue Fund by order of the Governor?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

It appears from your letter that there was transferred by the Governor, with the approval of the Comptroller, in order to meet a temporary deficiency in the General Revenue Fund, the sum of \$30,000.00, in May of 1938, and the sum of \$30,000.00 in October of 1940. This transfer was made under the authority of Section 215.18, Florida Statutes, 1941, formerly Section 2, Chapter 12295, Laws of Florida, Acts of 1927, which section is in the following language:

"Whenever there exists in any fund provided for by law or departmental regulation a deficiency which would render such fund insufficient to meet its just requirements, and there shall exist other funds in the state treasury which are for the time being or otherwise in excess of the amounts necessary to meet the just requirements of such last mentioned fund, the governor of the State of Florida may, with the approval of the comptroller, order a temporary transfer of funds from one fund to another in order to meet temporary deficiencies in particular funds without resorting to the necessity of borrowing money and paying interest thereon; provided, that the fund from which any money is temporarily transferred shall be repaid the amount transferred from it as soon as practicable thereafter, same to be done upon order of the governor and approved by the comptroller; provided, that no transfer shall be made from the funds provided for the operations of the state live stock sanitary board."

It is my opinion that the sum temporarily transferred, in the total amount of \$60,000.00, may be repaid from the General Revenue Fund to the State Board of Beauty Culture Fund, if it is available, upon the order of the Governor and approval of the Comptroller.

January 25, 1944.—044-35

#### STATE LIVESTOCK SANITARY BOARD—FISCAL YEAR

**QUESTION:** When do the funds appropriated by Chapter 21638, General Laws, 1943, become available for use by the State Livestock Sanitary Board?

*To Honorable J. V. Knapp, State Veterinarian:*

It is my opinion, in view of the definition of the fiscal year contained in Section 215.01, Florida Statutes, 1941, that the one hundred seventy-five thousand dollars annually appropriated by chapter 21638, Acts of 1943, will become available for use, to the extent that available funds are in the hands of the Treasurer, on July 1, 1944.

December 15, 1943.—043-333.

#### TRANSFERS OF FUNDS BETWEEN ACCOUNTS.

**QUESTION:** Under the existing emergency, have we any legal authority to increase the salaries of our employees over the total amount specifically appropriated for salaries by using any balance which may become available under our Necessary and Regular Expense appropriation?

*To Mr. Millard Davidson, Superintendent, Florida Industrial School for Boys,  
Marianna, Florida:*

In reply to this question I beg leave to state that under the terms and provisions of Section 215.18, Florida Statutes, 1941, it is provided that the Governor of the State of Florida may with the approval of the Comptroller order a temporary transfer of funds from one fund to another in order to meet a temporary deficiency in particular funds.

This provision is subject to the condition that the fund from which any money is temporarily transferred shall be repaid the amount paid from it as soon as is practicable thereafter.

It is my opinion that in applying for leave to transfer a part of the Necessary and Regular Expense Fund in the budget to the Salary Fund, you should apply to the Governor for such permission and, in doing so, it would be advisable to state conditions necessitating the transfer, and, of course, the amount to be transferred from one fund to another.

You further inquire as to whether or not there is any other fund of the State from which Institutions' salaries might be increased or supplemented.

In reply to this inquiry I beg leave to state that I know of no such fund.

## **CHAPTER XI**

### **HOMESTEADS AND EXEMPTIONS**

#### **INCLUSION IN MUNICIPALITY**

August 11, 1944.—044-231.

#### **REDUCTION OF HOMESTEAD AREA**

**QUESTION:** May the Tax Assessor reduce the area of homestead exemption because of the inclusion of said homestead in a municipality?

*To Honorable Ernest C. Nott, Tax Assessor, Marion County, Ocala, Florida:*

No homestead outside of the limits of a city is reduced on account of its being subsequently included within the limits of an incorporated city or town without the consent of the owner, and in consequence, the Tax Assessor should not reduce the area of such homestead exemption.



## CHAPTER XII

### EDUCATION

#### STATE AGENCIES

October 28, 1943.—043-285.

##### BOARD OF EDUCATION—PROTECTION OF SCHOOL LANDS

**QUESTION:** Is the State Board of Education liable for payment of a claim of the Florida Forest and Park Service for fire control service for school lands?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 229.08 (6) Florida Statutes, 1941, charges the State Board of Education with the management of school lands.

According to information by the State Land Office the State Board of Education entered into a cooperative agreement with the Florida Forest Service, dated August 1, 1940, wherein the State Board agreed to pay five cents (5¢) per acre for forest protection to 611.48 acres of school lands in Nassau County.

By Chapter 22071, Acts of 1943, item 29 (c), an appropriation of \$500.00 was made for "protection of state's school land."

It is my opinion that the State Board of Education had authority to contract for such fire control service for school lands and that the statement in question presents a valid claim which can be paid from funds appropriated by item 29 (c) of said Chapter 22071, Acts of 1943.

January 4, 1943.—043-21.

##### STATE SCHOOL FUND—REFUNDING BOND FEE; PAYMENT

**QUESTION:** Is the State Board of Education authorized to requisition a warrant on the principal of the State School Fund for the payment of a fee for refunding Town of Avon Park bonds?

*To Honorable J. Edwin Larson, State Treasurer:*

Article XII, Section 5, Florida Constitution, provides: "The principal of the state school fund shall remain sacred and inviolate."

Under Section 229.08, Florida Statutes, 1941, it is the duty and responsibility of the State Board of Education to administer the State Permanent School Fund "so that the principal shall remain sacred and inviolate, as required by Section 5, Article XII of the Constitution."

It is my opinion that under these provisions the State Board of Education has no authority to requisition a warrant on the principal of the State School Fund for the payment of a fee for refunding bonds.

It should be noted that the State Board did not file its acceptance of the plan of composition until after the number of bond holders required by the Wilcox Act to accept the plan of composition had been obtained and the same could have been executed without the acceptance of the plan by the State Board.

Filing acceptance of the plan of composition in the name of "Principal, State School Fund" can in no way be considered as a contract binding

the State School Fund to the payment of the refunding fee because all interested parties were charged with notice of the constitutional prohibition against using the principal of the State School Fund for any such purpose.

The constitutional mandate that the State School Fund shall remain sacred and inviolate cannot be overcome by contract. (*State Board of Education v. B.P.I. Lake County, Florida*, 138 Fla. 767, 190 So. 253).

On April 2, 1941, I issued an opinion that under the plan of composition approved by the U. S. District Court it was incumbent on the State Board of Education to pay a refunding fee. That opinion should not be viewed as conflicting with the above because no question re principal of the State School Fund was involved therein.

September 14, 1943.—043-243.

#### STATE SUPERINTENDENT: AUTHORITY—AGREEMENT ON BEHALF OF STATE BOARD

**QUESTION:** Does the State Superintendent have authority to execute an agreement on behalf of the State Board of Education with the Federal Food Distribution Administration for a school lunch subsidy program?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The State Board of Education is authorized to accept the provision of any Act of Congress appropriating funds to the State for use in connection with any phase of the state system of public education (Section 236.23, Florida Statutes, 1941); and to approve plans for cooperating with the Federal Government in carrying out any and all phases of the educational program in which it may find cooperation to be desirable, and to provide for the proper administration of funds which may be appropriated by Congress and apportioned to the State for any and all educational purposes, Section 229.08 (10); and the State Superintendent is authorized to recommend policies for administering funds which may be appropriated by Congress and apportioned to the State for any and all educational purposes, and to execute such plans as are approved.

The execution of such a contract with the Federal Food Distribution Administration is but a ministerial act in carrying out the execution of the approved plan. The State Board of Education by regulation adopted August 6, 1943, gave specific authority to the State Superintendent to perform such ministerial act.

It is therefore my opinion that the State Superintendent has authority to execute such agreement with the Federal Food Distribution Administration on behalf of the State Board of Education.

#### COUNTY SCHOOL SYSTEM

January 14, 1944.—044-19.

#### ATTORNEY—EMPLOYMENT

**QUESTION:** May a County Board of Public Instruction employ the County Attorney of such county to represent the School Board and pay him for services, the proposed compensation being in the budget for the present fiscal year, and payable out of the County General School Fund?

*To Honorable H. A. Rider, County Attorney, Hendry County, LaBelle, Florida:*

There is no express statutory authority for the employment of an attorney to represent a County Board of Public Instruction. However, the State Board of Education, under its power to adopt rules and regulations

which have the force and effect of law, on April 1, 1941, adopted a rule which in part provides as follows:

"If legal services are needed to care for the problem arising in any school district in the county, such legal services shall be provided through the attorney for the County Board, or if the Board does not have an attorney, through an attorney authorized and approved by the County Board, in order that all legal services for the schools of the county may be properly integrated and coordinated."

This rule leaves employment of an attorney entirely to the discretion of the County Board of Public Instruction, which Board may, by virtue of Section 230.22, Florida Statutes, 1941, adopt rules and regulations authorizing the employment of an attorney. Under an appropriate rule and regulation the County Attorney may serve as Attorney for the Board of Public Instruction of the same county.

Therefore, it is my opinion that the Board of Public Instruction of Hendry County may, by appropriate resolution, provide for the employment of the County Attorney of that county and may pay him out of the County General School Fund, as authorized in the budget for the fiscal year.

March 14, 1944.—044-84.

#### AUTHORITY TO PERMIT USE OF SCHOOL

**QUESTION:** 1. If title to a school building within a special tax school district is vested in the County School Board, may such County School Board determine the extra school uses for such school building without the consent of the special tax school district Trustees?

2. If title is vested in the special tax school district Trustees, may such Trustees, contrary to the wishes of the County School Board, permit extra school uses of the building?

3. If title is vested in the special tax school district Trustees, may such Trustees refuse to permit persons' or agencies' use of the school buildings for purposes which had been authorized by the County School Board?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 10, Article XII of the Constitution of the State of Florida, provides in part as follows:

"The legislature may provide for the division of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all schools within the district; . . ." (Emphasis supplied)

Section 230.03, Florida Statutes 1941, Subsection (4), provides:

"4. TRUSTEES. All schools in any school district which are supported in part from school district funds, shall be under the general supervision but not under the control of the trustees of that district, who shall constitute an advisory and limited policy-forming body for the district, as set forth in Sections 230.34 and 230.43."

Sections 230.35 and 230.36 provide for control and supervision of schools by County Boards and Superintendents, and the Trustees of school districts.

Section 230.43, Florida Statutes, 1941, which specifically sets out powers of Trustees, in Subsection (10) provides:

"To have general supervision of the buildings, grounds, equipment, and other property of the schools of the district and to recommend to the county superintendent or to the county board at an

official meeting, such repairs and alterations as may be considered necessary; provided that trustees, subject to regulations of the county board, may be authorized to make minor and emergency repairs; and, provided further, that when the title to property in the district is held by the trustees at the time the school code becomes a law, the county board shall delegate to the trustees of such district responsibility for using district current school funds . . . ”

and in (11) provides:

“To permit the use of the school buildings and grounds of the district for civic, social recreation and community purposes; provided, however, that such use does not interfere with the school program or materially increase the maintenance cost of the property.”

The above sections are cited to give a background for discussion of sections hereinafter discussed.

Under Section 10, Article XII, of the Constitution, quoted above, it is clear that the Trustees have supervision over all schools within the district. The statutes cannot supersede this recital, and the case of Board of Public Instruction for Manatee County v. State, 3 So. (2) 707, expressly recognizes this principle.

In that case it was contended that because the high school is a county school as defined by the School Code, that said school is supported exclusively by County Funds, and when such is the case that the teachers may be nominated by the County Superintendent.

The Court, in that case, said:

“There is no merit to this contention. Section 10, Article XII, of the Constitution provides that trustees of special tax school districts shall have the supervision of **all schools within the district** so any provision of the school code tending to destroy such supervision will not be enforced. The school code evidences no purpose to abrogate the general power of the trustees of special tax school districts to nominate teachers in a regularly constituted special tax school district. It is a mere fiction to contend that county schools are supported exclusively by county funds when the special tax school district is an integral part of the county . . . ” (Emphasis supplied).

It is therefore my opinion that the question of title is not controlling on the question of the use of the school buildings out of school hours.

Section 235.02, Florida Statutes, 1941, provides as follows:

“Subject to law, the trustees of any district may provide for or permit the use of **school buildings and grounds within the district**, out of school hours during the school term, or during vacation, for any legal assembly, or as community play centers, or may permit the same to be used as voting places in any primary, regular, or special election. The county board shall adopt rules and regulations necessary to protect school plants when used for such purposes, **and shall provide for the use of school property other than that under the supervision of trustees.**” (Emphasis supplied).

The section read in connection with Section 230.43 (11), Florida Statutes, 1941, previously mentioned, are the controlling statutes in determining the questions asked.

Much of the previous discussion has been designed to show that there exists no such class of property as indicated by the part of Section 235.02 last emphasized. This section permits the Trustees of a district where a school building is located, to permit use of the buildings and grounds out of school hours, as provided:

1. For any legal assembly.



2. For community play centers.
3. For voting places in any election.

The County Board shall adopt rules and regulations necessary to protect such school plants.

It is my opinion, in answer to question 1, that the County Board may not determine the extra school uses of a school building without the consent of the Trustees. This is the law without regard to title.

In answer to question 2, it is my opinion that the Trustees may permit limited extra school uses of school buildings, title to which are vested in the districts, contrary to the wishes of the County Board. Such use, however, is subject to reasonable general rules of the County Board adopted for the protection of such properties. The limited uses are: 1. For any legal assembly; 2. As community play centers; 3. For voting places in any election, and 4. Civic, social recreation and community purposes that do not interfere with the school program or materially increase the maintenance cost of the property.

In answer to question 3, it is my opinion that the Trustees may refuse to permit persons' or agencies' use of the school buildings for purposes which had been authorized by the County School Board.

In making rules and regulations for use of buildings, the County Board should keep in mind that a charge for the use of the building should be made when used for nonschool purposes, in an amount at least sufficient to defray expenses incident to the use of the building. Otherwise School Funds would be used for other than school purposes, contrary to the provisions of Article XII, Sections 9 and 10, of the Florida Constitution.

The Trustees can only use their best judgment in permitting such uses as appear to be within the provisions of the statutes, and the County Boards must adopt reasonable general rules necessary to protect the buildings. If persons feel their constitutional rights are being abridged by such control, the courts can then determine the specific question.

June 26, 1943.—043-150A.

#### COUNTY BOARD—APPOINTMENT OF BUILDING ENGINEER

**QUESTION:** Is the appointment of a building engineer for Technical High School, by the Dade County Board of Public Instruction, legal, when the appointment was made and approved by a three to two vote of the Board, with one member who did not hold a commission from the Governor as a Board member, voting in the affirmative?

*To Honorable Colin English, State Superintendent of Public Instruction:*

On January 13, 1943, I issued an opinion, affirmed by another opinion of this date, that the issuance of a commission is an absolute prerequisite to the right to perform the functions of a county office as a member of the County Board of Public Instruction.

Said member, not having been commissioned by the Governor to assume the duties of a member of the County Board of Public Instruction, in voting on said appointment, acted without authority of law and his act was of no effect. The appointment of said engineer not having been approved by a majority of the legally qualified members of said Board present at such meeting, it is my opinion that no valid appointment was made and that the county should not release any salary warrants to the person so appointed.

February 2, 1943.—043-37.

### COUNTY BOARDS—EXTRACURRICULAR FUNDS

QUESTION: 1. Does the Board of Public Instruction have any official control over the administering of Extracurricular Activity Funds?

2. Is the Board of Public Instruction responsible for any irregular expenditure of these funds?

3. Is it the responsibility of the Board of Public Instruction to protect these funds by periodical audits, bonding of employees handling same and other safeguards?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. The County Board of Public Instruction is responsible for the organization and control of the public schools of the county (Section 230.03(2), Florida Statutes, 1941); and it is the duty of said Board to determine such policies as are necessary, and to adopt such rules and regulations as will contribute to the orderly and efficient operation of the school system, and perform such duties and exercise such responsibilities as it may find necessary for the improvement of the county school system (Section 230.22 (1), (2) and (5)). Having authority to approve or disapprove extracurricular activities, it follows that the County Board has the duty and responsibility of seeing that any such activity is properly conducted, and such includes control over the administration of Extracurricular Activity Funds.

2. The answer to the first question is applicable to and answers this question. I also refer you to Section 230.23 (12) (f), which makes it the duty of the County Board to "Provide for the keeping of accurate records of all financial transactions, including records of school or student activity funds on forms prescribed by the state board and have these records kept under the various classifications commonly used in school financial accounting; authorize and compensate such trained assistants to the county superintendent as may be needed to maintain adequate records"; and Section 230.33(12) (f) makes it the duty of the County Superintendent to "Keep or have kept accurate records of all financial transactions on forms prescribed by the state board."

3. This question is answered by the following statutory provisions: Section 230.23(12) (g) provides in part that it is the duty of the County Board to "make available all records for proper audit by state officials; have prepared monthly statements showing receipts, balances, and expenditures to date and require a copy of each such statement to be filed with the state superintendent as provided by law."

Section 230.23(12) (h) makes it the duty of the County Board to "Fix and prescribe the bonds, and pay the premium on all such bonds, of all school employees who are responsible for school funds in order to provide reasonable safeguards for all such funds."

Section 237.29 provides that "Each and every official and employee of the county board, who is in any way responsible for collecting, depositing, budgeting, or expending school funds, or for purchasing materials or services for school usage, or is in any other manner responsible for school funds, shall see that these funds are fully and properly safeguarded at all times. Proper safeguards are to be evidenced not only by accurate and complete accounting, observance of all legal requirements, preparation of all required reports, but also by exercising every diligence to see that value has been received for any funds which are expended."

Section 237.21 provides that "Each and every official, or other person who is responsible in any manner for handling or expending school funds, shall be adequately bonded at all time . . .

"(3) . . . It shall be the responsibility of the county board to provide for the bonding of any school employee who is responsible for school moneys. The amount of the bond shall be prescribed by the county board of the county in which the person is employed. The bond may be with a surety company authorized to do business in Florida, or with two good and sufficient sureties."

January 24, 1944.—044-30.

#### COUNTY BOARD—LIABILITY FOR TORT

QUESTION: Is the County Board of Public Instruction of Dade County, Florida, civilly responsible for the death of a student?

*To Honorable Colin English, State Superintendent of Public Instruction:*

A long line of American decisions exempts school corporations from liability for noncontract injuries inflicted by them, whether the injury be inflicted upon the person or property of the teacher, pupil or any other person. *Ernst v. West Covington*, 116 Ky. 850, 64 LRA 652; *Dick v. Board of Education of St. Louis (Mo.)*, 238 SW 1073, 21 ALR 1327, and note. *Herman v. Board of Education*, 234 N. Y. 196, 24 ALR 1065.

The reason or basis behind such rule is stated in 47 Am. Jur. page 335, as follows:

"Various reasons are assigned why a school district should not be liable in tort. Some authorities place it on the ground that the relation of master and servant does not exist; others take the ground that the law provides no funds to meet such claims. Still other authorities hold that school directors in performing the duties required of them exercise merely a public function for the public good, for which they receive no private or corporate benefit. Many authorities do not base their holdings on any single ground, but rely on two or more of them at the same time."

I can cite no case decided by the Supreme Court of this State directly authorizing or denying the right to sue a County Board of Public Instruction in an action sounding in tort. However, such Boards are subject to suit and a consideration of the cases in those actions that have been permitted is helpful.

Even prior to adoption of the statute specifically permitting the same, County School Boards have been subject to suit in appropriate actions. See *Board of Public Instruction of Pinellas County v. Knight & Wall Co.*, 132 So. 644; *First National Bank of Gainesville v. Board of Public Instruction*, 111 So. 521. It was recognized in those suits that although the statutes did not give specific authorization to sue and be sued, that the Board was not a branch of the sovereignty of the State and might sue and be sued with reference to its powers and obligations lawfully incurred, the payment of which would not involve an unlawful disbursement of County School Funds.

Also cases decided before such permission to sue had been given by statute, denied recovery in other actions on the ground that the claim was not for such a county purpose as would warrant payment from County School Funds that by express command of the Constitution are distributed solely for maintenance and support of public free schools. See *McKinnon v. State*, 70 So. 557, and discussion in *Board of Public Instruction v. Kennedy*, 147 So. 250.

By Section 230.21, Florida Statutes, 1941, each County Board is constituted a body corporate, and is authorized to sue and be sued under Section 230.22(4), Florida Statutes, 1941, which provides:

"(4) CONTRACT, SUE, AND BE SUED.—The County Board shall constitute the contracting agent for the county school system.

It may, when acting as a body, make contracts, also sue and be sued in the name of the county board; provided that in any suit, a change in personnel of the board shall not abate the suit, which shall proceed as if such change had not taken place."

Section 230.23(4), Florida Statutes, 1941, also grants power to sue and be sued in connection with the ownership, disposal, etc., of real estate.

The fact that such a Board is authorized to "sue and be sued" has been held not to authorize an action for tort but to refer to suits in respect to matters within the scope of the Boards' duties. 47 Am. Jur. page 308; Consolidated School District v. Wright, 128 Okla. 193, 56 ALR 152.

Sections 230.22(4) and 230.23(4), Florida Statutes, 1941, authorizing County Boards to sue and be sued are to be read in connection with the remainder of these sections and must be construed to mean that such Boards may sue or be sued in connection with powers granted by those sections. No liability to respond in tort may be read in connection with these sections, and unless such liability is specifically created it may not be said to exist.

This is further borne out by consideration of Section 234.03(3), Florida Statutes, 1941, with reference to liability insurance to be carried on school busses, which provides, in part:

"(3) Waiver of Immunity. In consideration of the premium at which each policy shall be written, it shall be a part of the policy contract between the company and the insured that the company shall not be entitled to the benefit of governmental immunity of the insured, . . ."

This is a specific statutory indication that the Legislature did not intend to authorize suits for tort against the Boards except in cases provided by statute.

County School Boards have been construed to be county agencies (First National Bank of Gainesville v. Board of Public Instruction, *supra*), and it is doubtful that the type of immunity discussed in the cases of Arundel Corporation v. Griffin, 103 So. 421, and Keggin v. Hillsborough County, 71 So. 371, may be said to apply to them, but because of the limitation of use of funds as provided by statute and by Article XII of the Constitution, and consideration of the public purposes of the corporation and implied limitations in the School Code, and Section 230.03(1), Florida Statutes, 1941, providing that the county school system shall be considered a part of the state system of public education, it is my opinion that although the County School Boards have been granted power to sue and be sued, such grant does not permit action for tort against such Boards.

I have carefully examined the report of the inquest, photographs, statements of the Superintendent of Public Instruction of Dade County, the witnesses, the Principal, and others having knowledge of the facts and circumstances surrounding the regrettable death of a student at Miami High School. There appear to be no facts that modify or change the general propositions stated herein.

I have given no consideration to the personal liability of the individuals constituting the County School Board. In certain instances our courts have held public officials liable for torts for neglect or wrongful failure to perform imperative or ministerial duties. First National Bank of Key West v. Filer, 145 So. 204; Fidelity & Deposit Company v. Cone, 190 So. 269.

February 9, 1943.—043-43.

#### COUNTY BOARD—MILITARY DRILLS; NONPARTICIPATION OF PUPILS

QUESTION: 1. Is the County Board of Public Instruction authorized to suspend pupils who belong to the Jehovah's Witness religious faith who have refused to participate in military drill?



2. Would there be any difference in the authority and responsibility of the County Board, if the pupils were of compulsory attendance age, or if they were above the compulsory attendance age?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. The State Department of Education, in determining policies, regulations and minimum standards for a program of public education, Section 229.09(20)-(23), Florida Statutes, 1941, has by regulation included units in physical education as a requirement for graduation from high schools. In compliance therewith, the local County Board has adopted as a part of a course of study, Section 230.23(5), Section 230.23(9)(a), two periods of military drill each week.

Under Section 230.23(8)(d), the County Board has authority to adopt rules and regulations for control, discipline and suspension of pupils and to decide all cases recommended for dismissal; and under Section 230.23(16), is charged with seeing that regulations of State and County Boards are enforced.

The courts have held that the exercise of such statutory power and right to suspend students who refuse to take a prescribed course of military training, even though such refusal is based on conscientious religious convictions, is not a violation of the constitutional rights and liberties of said students. *Pearson v. Cole*, (Md.) 167 Atl. 54; *Hamilton v. University of California*, 293 U. S. 245, 79 L.Ed. 343, 55 S. Ct. 197.

It is my opinion that the County Board is authorized to suspend from school pupils who refuse to comply with such requirements.

2. The action of the County Board being disciplinary, the right and authority of said Board to suspend is applicable to pupils above the compulsory attendance age as well as those within the compulsory attendance age.

December 21, 1944.—044-349.

#### COUNTY BOARD—RENTAL OF DEMONSTRATION SCHOOL UNIT

QUESTION: May the Board of Public Instruction of Leon County, Florida, bind itself and future Boards for a period of fifteen to twenty years to the expenditure of a given annual amount for the rental of a school building and facilities to be constructed by the Board of Control for the Florida State College for Women on property of the College, which building is to be constructed for, and used as, a Demonstration School unit serving pupils of Tallahassee and Leon County?

*To the State Board of Control:*

From the memorandum which you submitted it appears that in connection with one of the major obligations of the Florida State College for Women, the training of teachers, it is necessary to construct a new Demonstration School unit for approximately 600 pupils on property of the College. The pupils attending the school would be children of school age of Leon County. The teachers are selected and employed by the College, and the school and teachers are under the exclusive control of the College. Under such arrangement, the County Board of Education is relieved of the necessity of providing adequate housing and instruction for the county pupils attending the Demonstration School.

The general law on the subject seems to be that a School Board may bind its successors as to proprietary rights (such as the purchase of property, or lease of school premises for a reasonable period), but not as to governing or legislative rights (such as type of school, classes to be taught, teacher employment, regulations, and all other matters pertaining to the conduct of the school). However, we have a statute which definitely

limits the Board's authority in that respect. Except as to long term district bonds, Section 237.27, Florida Statutes, 1941, limits the contractual authority of the County Board to obligations which can be retired during the current fiscal year, with certain exceptions, namely, the purchase of school busses, purchase of land for school sites, and the erection, alteration, or addition to school plants, which last named obligations, under certain conditions set out in the statute, may extend over a period of four years (school bus contracts, six years).

The County Board has general authority to lease property under Section 230.23 (4), but that authority is limited under Section 230.23 (11) (b), where the Board is authorized "to rent buildings when necessary." A former Attorney General has held that a necessity for renting must appear, and I agree with that construction. In any event, a rental contract is limited to one year under Section 237.27, but it is a mistake to refer to such contributions by the County Board as rent. Rent is consideration paid for the use and occupation of property, but under the plan outlined above the County Board has neither the use, possession nor control of the premises. The plan actually consists of a contribution toward the cost of constructing the building in exchange for the instruction and school facilities supplied to county school children. There is nothing in the School Code which would warrant expenditure of county school funds for any such purpose.

Such a school is not a part of the county school system because it is not under the control of the County Board, and the County Board, therefore, would have no authority to contract to expend county funds for any period toward the cost of construction or maintenance of the school, by whatever name such expenditure might be called. It would be a state school, not a county school. The only control which could be exercised by the County Board would be that of school attendance, such as it has in regard to private schools. So far as the County Board is concerned, it would occupy the status of a private school, and the County Board would have no more right to contribute to such school than it would to a private school for services supplied to school children.

I have no doubt that the arrangement proposed, as well as that now in effect, is a splendid one, both from the point of view of the college and the County Board of Public Instruction. On the one hand such a Demonstration School is essential to the work of the College in the training of teachers, and on the other hand, it relieves the county of the great cost of school buildings to serve the children attending the school, in the same measure as private schools relieve the county burden. Notwithstanding the desirability of such arrangement, there is no statutory authority for it.

Enabling legislation would be required perhaps by authorizing payment of tuition by the County Board to the College for such length of time as might be authorized; but if such legislation authorized the County Board to make a long term contract, it might present serious difficulties. Because of changing conditions, there would always be the possibility of parent demand at any time for a county-operated school within the county school system, and for this reason I believe such legislation should not permit such contributions for more than a very few years at most, or unless the contributions were limited to the Leon County per capita costs for each pupil attending the Demonstration School. While your question does not cover the matter of apportionment from the State Teachers' Salary Fund for the regular teachers of such school, the allotment should also be specifically included in any legislation authorizing such a plan as that outlined above. The present statutes do not seem to authorize transfer of such allotments to the College.

For the reasons stated, it is my opinion that your question must be answered in the negative.

June 26, 1943.—043-150B.

#### COUNTY BOARD—SALARY CLAIM OF MEMBER; LEGALITY

**QUESTION:** Is a claim for salary, as a member of the County Board of Public Instruction, from January 28, 1943, to date of his removal, legal?

*To Honorable Colin English, State Superintendent of Public Instruction:*

On January 13, 1943, I issued an opinion that the issuance of a commission is an absolute prerequisite to the right to perform the functions of office as member of the County Board of Public Instruction. Any person, not having been commissioned by the Governor to assume the duties and serve the term of office beginning January 5, 1943, as a member of the County Board of Public Instruction, has no valid or legal claim for salary for the period in question and no salary warrant should be released to him thereon.

The subsequent order of removal should in no way be construed as recognition by the Senate of him as a legally acting Board member; on the contrary, said removal must be construed and considered as a removal and final termination of any claim he may have had to the office by virtue of his election.

August 18, 1944.—044-247.

#### COUNTY BUDGET COMMISSION—POWERS AND DUTIES

**QUESTION:** What is the duty of the County Budget Commission in the matter of the adoption of the school budget where a five per cent increase is proposed?

*To Honorable Colin English, State Superintendent of Public Instruction:*

My opinion of July 19th on the above subject was in response to a question arising in a county having a population of 75,000 or more according to the latest federal census, and having a County Budget Commission whose duty it is to make or adopt school budgets, and the opinion should have stated that it was limited and applicable to such counties only. Accordingly that opinion is amended by limiting what was said therein as to review and adoption of the budget by the County Budget Commission to counties coming within the above description.

I might also supplement the views therein expressed by adding that in my opinion, even in the counties coming within the above classification, the action of the County Budget Commission is merely advisory, and the County Budget Commission's refusal to adopt or approve such a proposed budget would not affect the right of the State Board of Education to approve the same.

December 4, 1944.—044-336.

#### COUNTY SUPERINTENDENT—RIGHT TO HOLD MUNICIPAL OFFICE

**QUESTION:** 1. Is the position of the Superintendent of Public Instruction a part-time one?

2. Is it the intent of the law that the Superintendent of Public Instruction maintain regular office hours like other elected county officers, such as the Clerk, the Tax Assessor, the Tax Collector, the County Judge, etc., who are on official duty from 9 to 12 noon and from 1 to 4 P. M., or can he attend to official school duties when and if he cares to do so?

3. Can a Superintendent of Public Instruction also fill the elective office of mayor of the municipality?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. The statutes do not classify public officers as full-time and part-time officers. Neither the constitution nor the statutes specifically require that a public officer give his full time to the duties of the public office which he holds. The amount of time which he devotes to his official duties is, to a large extent, left to the discretion of the public officer. On the other hand, he is required to attend to his duties diligently and to the best of his ability. The law requires the public officer to devote whatever of his time may be necessary to the competent and adequate performance of his public duty. He may be removed by the Governor for neglect of duty.

2. There are no hours fixed by the statutes for the performance of duties of such county officers, but, by long practice and custom, the public officer is supposed to attend to his duties during the usual and normal business hours or so much of those usual business hours as may be necessary to fully perform his duties. He is a public servant and, whatever his duties to the public may be, they should be performed at such times as will meet the reasonable convenience of the public. He should refrain from outside activities which would interfere with the competent performance of his duties.

3. The prohibition of persons holding two offices at one time is contained in Article XVI, Section 15, of the Constitution, which is in part as follows:

"And no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; Provided, Notaries Public, militia officers, county school officers and Commissioners of Deeds, may be elected or appointed to fill any legislative, executive or Judicial office."

Our Court has held that a municipal office is not an office under the government of the State within the meaning of that section of the Constitution. It will also be observed that the provision permits county school officers to hold legislative, executive, or judicial offices which would include a municipal office. The answer to the third question is, therefore, that the County Superintendent is not prohibited from holding the office of mayor of a municipality.

July 17, 1944.—044-207.

#### ELECTION DISTRICTS—CHANGE OF BOUNDARIES.

QUESTION: What procedure should be followed in changing the boundaries of a County Board election district?

*To Honorable A. J. Martin, Member of the Board of Public Instruction, Okaloosa County, Laurel Hill, Florida:*

Your problem is governed by Sections 230.06 and 230.07, Florida Statutes, 1941. Assuming that yours is a three-member board county, you may proceed as follows:

1. Prepare a description of the newly proposed districts, keeping in mind the requirements of Section 230.06 that there be placed in each district, as nearly as may be practicable, the same number of qualified electors, and that the lines of the districts be so drawn as to place each election precinct wholly within a district.

2. Prepare a resolution changing the boundaries of the districts and naming the election precincts comprising each district affected by the change.

3. Then, at a meeting held in January of the year of any general election, present the resolution to the Board. The resolution adopted should be spread upon the minutes of the Board and recorded in the office of the Clerk of the Circuit Court. Section 230.07.



4. Publish a copy of the resolution containing the new description of the boundaries of the affected districts at least once in a newspaper published in the county within thirty (30) days after the adoption of the resolution, or, if there be no newspaper published in the county, the resolution must be posted at the county courthouse door for four weeks immediately following the adoption of the resolution.

If you will carefully follow the foregoing procedure your changes in the boundaries of the affected districts will be lawfully made.

June 15, 1944.—044-175.

#### LUNCHROOM PROGRAM—RESPONSIBILITY

QUESTION: Under the provisions of the School Code may the County Board of Public Instruction:

1. Establish and provide for the operation of school lunch programs?

2. Delegate the responsibility for the operation of the lunchroom programs to Trustees of special tax school districts or P. T. A.'s?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I have carefully examined the numerous sections of the statutes relating to the powers, duties, authority and responsibility of the Board of Public Instruction and of the special tax school district trustees insofar as they may have bearing upon your question.

Without undertaking to refer to all of the pertinent sections of the statutes, the following sections indicate clearly, I think, the intention of the Legislature to lodge the ultimate authority and responsibility for the whole county school program in the Board of Public Instruction.

Section 230.03(2), Florida Statutes, 1941, vests responsibility for the control of the public schools in the County Board. Section 230.22(1), (2) and (5), requires the Board to determine and adopt policies, rules and regulations which the Board deems necessary or finds advisable for the general improvement and the more efficient operation of the schools, and for carrying out the purposes and objectives of the school program. Section 230.23(7) requires the Board to designate positions to be filled, prescribe qualifications for positions, provide for appointments, compensation, promotion, suspension, dismissals, etc. Section 227.13(12) provides that the officers of the county school system shall be the superintendent and members of the Board. Section 228.19 vests the general control and the immediate control of other educational services in the Board. Section 232.37 places the responsibility for school sanitation in the Board, and Section 233.29 gives the Board authority for the establishment of school libraries.

The powers, duties, functions and responsibilities of the Trustees are defined in the following provisions of the Constitution and Statutes: (Emphasis supplied.)

**Florida Constitution, Article XII, Section 10. "County school districts; trustees; tax.**—The legislature may provide for the division of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all the schools within the district; . . . "

**"230.03(4) Trustees.**—All schools in any school district which are supported in part from school district funds shall be under the general supervision but not under the control of the trustees of that district, who shall constitute an advisory and limited policy-forming body for the district, as set forth in 230.34-230.43.

**"230.36 Schools under general supervision of trustees.**—When ever a school district is created and trustees are elected, they shall have the **general supervision** of all public schools in the district for the support of which school district funds are used. The powers of the trustees shall not be those of control but of general supervision only, as hereinafter provided.

**"230.42 General powers of trustees.**—The powers of the trustees shall be **supervisory in nature** and not administrative or controlling powers . . .

**"227.13(13) Trustees.**—The trustees of each school district shall be subordinate school officers . . ."

Sections 230.43, Subsections (1)-(6) and (8)-(11) cover specific powers and responsibilities of the Trustees, and relate to nominations of principals, other instructional personnel, recommendation as to dismissals, expenditure of district current funds, bond issues and tax levies, approval of budgets, supervision of buildings, grounds, use of property, etc.

Subsection (7) is as follows:

**"(7) Manage local school funds.**—To be responsible for the management, handling, and proper expenditure of local school funds derived from school entertainments, school athletic contests, school cafeterias, and from similar local school sources when conducted as school projects under the direction of the school trustees; provided that all such accounts shall be kept in accordance with regulations prescribed by the state board and by the county board and shall be audited at least once each year as prescribed by regulations of the county board."

The foregoing Subparagraph (7) is quoted in full for the reason that it refers to school cafeterias and makes the Trustees responsible for the management, handling and expenditure of such funds when a local project is conducted under the direction of the Trustees. I think that here again their duty is only supervisory because Section 230.03, Subparagraph (4) quoted above, states in plain language that the Trustees shall have supervision only and not control and that they shall constitute an advisory and limited policy-forming body in those matters set forth in Sections 230.34 to 230.43. The subparagraph in regard to handling funds derived from cafeterias (quoted above) comes within those sections. From this it clearly appears that the Legislature intended nothing more than supervision of cafeteria funds.

In certain instances the Legislature has given the Trustees a specific power superior to that of the Board, for example, power to veto the Board's selection of school sites, etc., if the Trustees consider the cost excessive or location improper, but none of these powers relate to the questions under consideration.

While, as stated above, it appears that the ultimate authority, control and responsibility for the whole school program is in the Board, the Constitution gives the Trustees supervision of all the schools in their district and anything to the contrary in the School Code would be invalid.

This brings us to a consideration of what is meant by "supervision" as used in the Constitution. I find nothing in the constitutional provision which would justify an exception to the general rule of construction, that words in common use should be given their natural, plain, ordinary and commonly used meaning. The word seems to have remained true to its derivation. It stems from super, over, and videre, to see, whence we get its synonym, "oversee."

Webster gives the word "supervise" the following current definitions:

"To oversee for direction; to superintend; to inspect with authority; as, to supervise the printing of a book; also, to exercise supervision over; as, to supervise a department in a school or business."

The same authority defines supervision in relation to educational matters as:

"The direction and critical evaluation of instruction, especially in the public schools."

See also *Van Tongerou v. Heffernan*, 38 N.W. 52, 5 Dak. 180; *City of Geneseo v. Illinois Northern Utilities Co.*, 39 N.E. 2d 26, 34, 378 Ill. 506.

From the foregoing it will appear that the County Board of Public Instruction is authorized to establish and provide for the operation of the school lunch program; and that the County Board would not be authorized to delegate its responsibility for that program to the Trustees, or any other agency. This does not mean that the Trustees are excluded from the school lunch program. They cannot be excluded from the program because under the Constitutional provision set out above, they have supervision of the school and this will include the school lunch program, but, as in other matters, they have supervision only, (including the right to nominate employees of said program) unless something more than supervision is given to them by action of the Board. In any event, the ultimate responsibility rests upon the Board.

The question will recur from time to time as to whether a particular function may be one of control or of supervision and it is impossible to lay down a well defined line of demarcation. Stating the matter in general terms, the Board has the ultimate control and responsibility of the whole county system within proper regulations of the State Board. The Board should function through broad, general, basic, fundamental rules, regulations and policies applicable to the county system as a whole. Within those rules, regulations and policies the Trustees should be permitted to perform their duties of supervision, and I think supervision includes the exercise of judgment, discretion, and authority so long as it is consistent with the general overall policies and rules of the Board. This requires the fair recognition by each group of the functions of the other group. The Trustees should not invade the duties and responsibilities of the Board and the Board should not interfere with the Trustees in the exercise of their necessary authority or in their supervision of the district schools.

February 19, 1943.—043-49.

#### SCHOOL OFFICIALS—MILITARY SERVICE.

**QUESTION:** 1. Can the office of School Trustee, County School Board member, or County Superintendent be considered vacant in any situation where the school official (a member of the armed forces of the United States) is stationed or located outside of his district or county for an indefinite period of time?

2. If a vacancy is considered to exist in such a situation, what steps should be taken to declare the position vacant?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In advisory opinions to the Governor, 8 So. 2d. 26, 9 So. 2d. 172, our Supreme Court stated that the purpose of Chapter 20718 as amended by Chapter 20863, Acts of 1941, was to secure to officers their tenure in office if called into war service, and that absence with leave does not ipso facto create a vacancy in office.

In addition to the foregoing, said opinions in effect advise that the appointment of someone to perform the duties of said office during the absence of such official is within the constitutional prerogative of the Governor. The only exception, as far as school officers are concerned, is the acting County Superintendent, who may be designated by the County Board with the approval of the Governor.

Said two advisory opinions, however, consider only those cases without official dereliction of officers who are absent in war service with leave.

Your questions may very properly contemplate instances where the school officer in service has not requested a leave of absence, under Chapter 20718 as amended by Chapter 20863, Acts of 1941.

The Constitution requires that an officer give his personal attention to his office and that the Governor take care that the laws be faithfully executed. All school officials being charged with the knowledge and the effect of Chapter 20718 as amended by Chapter 20863, Acts of 1941, failure to obtain a leave of absence from office and the duties thereof, knowing that he cannot perform the same, may be considered as an abandonment of the office, leaving it vacant, or as such neglect of duty as to warrant, under Section 14, Article IV, Florida Constitution, the Governor's suspending such official from office.

It is my opinion that the appointing power has the authority, after giving notice to the official absent without leave in military service, of his rights under Chapter 20718 as amended by Chapter 20863, Acts of 1941, to determine and declare whether or not a vacancy exists in the office of County Superintendent or County Board of Public Instruction; and, if existing facts do not, in the judgment of the appointing power, warrant the declaring of a vacancy, to suspend such official from office. In either case the Governor shall make his appointment filling the same.

A Trustee of a special tax school district is not an officer subject to suspension, removal or appointment by the Governor, *State ex rel. Landis v. Blake*, 148 So. 566, Section 227.13(13), Florida Statutes, 1941. A Trustee may be removed by the State Board of Education, for failure to discharge the duties of his position, after giving ten days written notice. Section 230.41, and such vacancy shall be filled by the County Board, Section 230.23(13)(b).

September 9, 1943.—043-240.

#### STUDENTS—PLEDGE OF ALLEGIANCE TO THE FLAG

**QUESTION:** What steps is the County Superintendent of Public Instruction permitted to take with a child who is a member of a sect known as Jehovah's Witnesses, who refuses to salute and give the pledge of allegiance to the American flag in a school patriotic program?

*To Honorable T. Frank McCall, County Superintendent of Public Instruction,  
Levy County, Bronson, Florida:*

While the Supreme Court of Florida in *State vs. B. P. I. Hillsborough County*, 190 So. 815, held that a regulation requiring such salute and pledge was a valid regulation, in the recent case of *Branette vs. W. Va. State Board of Education*, 47 Federal Supp. 251, a school regulation requiring children to salute the flag was held void insofar as it applied to the children with conscientious religious scruples against giving such salute.

Since the *Barnette* case the United States Congress has enacted Section 7, U. S. Public Law 623, approved June 22, 1942, as amended by U. S. Public Law 829, approved Dec. 22, 1942, which relates to the use of the flag and provides in part as follows: "However, civilians will always show respect to the flag when the pledge is given by merely standing at attention, men removing the headdress."

This provision was enacted as part of the Florida law by Chapter 22015, Acts of 1943.

It is my opinion that this statute supersedes the above cited Florida decision and that you cannot require the pledge or salute to the American flag by a child objecting thereto for religious reasons.

I regard the flag salute in schools as a highly desirable ceremony. You undoubtedly may require the child to show full respect to the flag by standing at attention while the salute and pledge are being given; and on failure



to do so, you may discipline the child, even to the point of suspension, under rules and regulations adopted by the County Board authorized by said Chapter 22015. May I suggest that you write Honorable Colin English, State Superintendent, Tallahassee, who, I am sure, will advise you of any rules and regulations adopted by other County Boards and what procedure generally has been followed to cope with the problem.

## COUNTY SCHOOL OFFICERS AND PERSONNEL

August 16, 1943.—043-209.

### COUNTY SUPERINTENDENT—DUAL OFFICES

**QUESTION:** Can a person continue to serve as a member of the Overseas Road and Toll Bridge Commission while serving as acting County Superintendent of Public Instruction?

*To Honorable Spessard L. Holland, Governor:*

Article XVI, Section 15, provides in part:

"... and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial offices."

Under the constitutional prohibition, specific provision is made that county school officers may be elected or appointed to fill any legislative, executive or judicial office, which provision clearly contemplates that county school officers may serve in a county school office and another office at the same time.

It is therefore my opinion that a person receiving an appointment as an acting County Superintendent of Public Instruction may continue to serve as a member of said Toll Bridge Commission.

September 17, 1943.—043-247.

### COUNTY SUPERINTENDENT—SALARY

**QUESTION:** Where federal grants are made to county schools for their current school operating program may the amount of such be properly included in calculating the salary of the County Superintendent?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 242.01 provides that the annual salary of the County Superintendent shall be based on "the total annual receipts of each of said counties from all sources for school purposes, including Special Tax School District taxes and moneys apportioned to the said counties from the State Teachers' Salary Fund," according to the last preceding budget year.

It is my opinion that Federal Funds paid to counties for the current school operating program come within the classification of "total receipts ... from all sources for school purposes" and should be included in calculating the Superintendent's salary. I call your attention, however, to the proviso of Section 242.01, as follows: "provided, however, that the maximum amount which any Superintendent may be paid shall not exceed the sum of \$600.00 in excess of the amount which he was being paid on June 9, 1937 for his annual salary."

May 26, 1944.—044-155.

#### TEACHERS—PAYMENT OF ACCUMULATED SICK LEAVE

**QUESTION:** Is it optional with, or obligatory on, the School Board to pay one-half of the accumulated sick leave of nine days earned in other counties by a teacher now employed in another county?

*To Dr. A. S. Ham, Superintendent of Public Instruction, Franklin County, Apalachicola, Florida:*

In an opinion dated February 5, 1942, to the State Superintendent of Public Instruction, I construed Section 231.40, Florida Statutes, 1941 (Section 540, School Code). This opinion may be found on Pages 277 and 278 of the Biennial Report of the Attorney General for the biennium 1941-1942.

You will observe from what was said in the above mentioned opinion, to which I adhere, that it is not optional with, but is obligatory on your Board to pay for accumulated sick leave earned in other counties, within the statutory limitation, up to the number of days' sick leave earned in your school system. In other words, the teacher may demand payment for five days of accumulated sick leave earned in other counties during her first year in your county, and demand payment for the other four days of accumulated sick leave during her second year of teaching in your county, provided it is not claimed later than the third year after it was earned.

November 5, 1943.—043-301.

#### TEACHERS—REVOCATION OF CERTIFICATES

**QUESTION:** Is the State Board of Education authorized to revoke a teacher's certificate for failure to pay a promissory note?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 231.28, Florida Statutes, 1941, authorizes the revocation of any certificate "provided that it be made to appear to the State Board that the holder has secured the certificate by fraudulent means, has proved to be incompetent, unsuccessful, or guilty of gross immorality, or has otherwise violated any provision of the school code, for which the penalty of revocation of certificate is provided."

It is my opinion that failure to pay a note, which is an item of financial responsibility, does not come within the grounds of fraud, loss or lack of professional qualifications or a breach of morals, as cause for revocation of a teacher's certificate, and that the State Board of Education is not authorized to revoke a teacher's certificate for such reason.

February 9, 1943.—043-44.

#### TEACHERS; REVOCATION OF CERTIFICATES—HEARING; NOTICE; PROCEDURE

**QUESTION:** What is the proper form and procedure to be used for a hearing by the Board of Education to revoke the certificate of a teacher for cause?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I recommend that the following notice be used:

## STATE BOARD OF EDUCATION OF FLORIDA

Capitol Building  
Tallahassee, Florida

To: Name \_\_\_\_\_ NOTICE OF HEARING  
St. and No. \_\_\_\_\_ ON CHARGES TO REVOKE  
City \_\_\_\_\_ TEACHER'S CERTIFICATE  
State \_\_\_\_\_

WHEREAS, \_\_\_\_\_, Superintendent of Public Instruction of \_\_\_\_\_ County, Florida, has recommended to the State Superintendent of Public Instruction that your teacher's certificate be revoked, with a statement of the reasons for his recommendation, on which said State Superintendent has recommended to the State Board of Education that your teacher's certificate be revoked for cause, said revocation to be based upon evidence to be submitted to said State Board, and the reasons therefor being as follows: (State reasons. Same should be direct and specific.)

NOTICE IS HEREBY GIVEN, that a hearing will be had on said recommendations by and before the State Board of Education of Florida, at its regular place of meeting, Capitol Building, Tallahassee, Florida, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 194\_\_\_\_\_.

You are hereby notified to be present at said hearing at which time you will be given an opportunity to be heard in your own defense (with legal counsel if desired), showing cause, if any, why your teacher's certificate and license to teach in the public schools of Florida should not be revoked.

WITNESS the hand of the State Superintendent as Secretary of the State Board of Education of Florida, at Tallahassee, Florida this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 194\_\_\_\_\_.

\_\_\_\_\_  
State Superintendent of Public Instruction.

The foregoing notice in writing should be served on the offending teacher not less than ten days prior to the date of such hearing, either in person with due proof of service thereof, or by registered mail with a return receipt requested, addressed to the usual place of abode of said teacher.

The procedure followed in hearings of a similar nature should be used in this proceeding. At the hearing the teacher should be given full opportunity to present evidence, to be heard in his own defense, and if desired, to be represented by legal counsel.

November 15, 1943.—043-305.

## TRUSTEES—ELECTION; PROCEDURE

**QUESTION:** What procedure is to be followed in an election of Trustees for a school district where two persons receive the highest number of votes and candidates for the third office of Trustee receive a tie vote?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 236.32 (2) (a), Florida Statutes, 1941, provides: "All school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as provided in this chapter."

Section 236.32 (2) (f), provides that the three persons receiving the highest number of votes cast on the ballot for the election of Trustees shall serve for the ensuing two years as Trustees of the district.

It is my opinion that the first two persons who received the highest number of votes were duly elected and that as to the third office where the vote was a tie there was no election; 20 C. J. 268. Section 99.48, Florida

Statutes, relating to general elections, provides: "In case two or more persons shall receive an equal and highest number of votes for the same office, another election therefor shall be held upon the order of the governor as in other cases of special elections." The County Board should notify the Governor of the tie vote in such election and request that he order an election to fill such office as provided for in said section.

In view of the fact that new members do not take office until the first Tuesday after the first Monday in January following the election (230.37, Florida Statutes), there is ample time for the ordering and holding of said election prior to the expiration of the term of the incumbent.

October 13, 1943.—043-270.

#### TRUSTEES; RESIGNATION—APPOINTMENT OF SUCCESSORS

**QUESTION:** Does the Governor have the authority to accept the resignation of a local school district Trustee and appoint a successor?

*To Honorable Spessard L. Holland, Governor:*

I wish to advise that I find that the School Code provides in Section 230.23, Subparagraph 13 (b) as follows:

"... after any biennial election in which trustees are elected for any district, a vacancy should occur among the trustees, the county board shall appoint, after consulting with the patrons of the school, a qualified person from the district to serve in the position of trustee until the next biennial election."

I therefore am of the opinion that since the appointive power is vested in the County Board, resignations should be submitted to this Board and if the Board accepts such resignations, then it is authorized, under the above quoted section of the School Code to fill the vacancies in the manner thereby prescribed.

March 6, 1944.—044-70.

#### SCHOOL ATTENDANCE—JURISDICTION OF COURTS

**QUESTION:** 1. Does the Juvenile Court have authority to try parents for failing to send their children to school?

2. Can the Juvenile Court or County Judge's Court try such cases without a jury?

3. Does the County Judge's Court have authority to issue warrants in such cases or hold preliminary trials?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The first two questions posed by your inquiry have been answered by a former opinion of this office dated September 25, 1942. See Biennial Report of the Attorney General, 1941-1942, page 281.

The third question is answered by Section 17, Article V, Constitution of the State of Florida, which provides that the County Judge shall have the power of a committing magistrate. The County Judge cannot be divested of his constitutional powers as a committing magistrate, by statute.

I am therefore of the opinion that for the reasons stated above, question (1) should be answered in the negative, question (2) should be answered in the negative, and question (3) should be answered in the affirmative.



**COURSES OF STUDY; INSTRUCTIONAL AIDS**

November 21, 1944.—044-324.

**TEXTBOOKS—ADOPTION FOR USE OF PUPILS**

**QUESTION:** Does the provision in Item 16 of Section 1 of Chapter 22071, Acts of 1943, the General Appropriation Act, permit the purchase and distribution of books for pupil use on the subject of State and Federal Government without complying with statutory requirements for formal adoption of textbooks for pupil use?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Item 16 of Section 1 of Chapter 22071, Acts of 1943 appropriates the sum of \$900,000 for the purchase of textbooks for the biennium and adds the following provision:

"The above amount to include necessary expenditure for the dissemination to teachers of information with reference to State and Federal Government."

It is my opinion that textbooks for pupil use may be purchased and distributed only in accordance with the provisions of Chapter 233, Florida Statutes, 1941. The quoted provision of the Appropriation Act merely authorizes the State Board to expend a reasonable sum from the textbook fund for the purchase of books or other writings on the subject for teacher use, and which are designed to supply information and instruction to the teachers for the teaching of such subjects. The quoted provision is not broad enough to permit any expenditure from the textbook fund for the purchase and distribution of books for pupil use.

February 8, 1943.—043-42.

**TEXTBOOKS OWNED BY STATE—USE IN NONPUBLIC SCHOOLS**

**QUESTION:** Have school officials under any circumstances authority to provide state-owned textbooks for use in schools that are not "in the uniform system of public schools" of the State of Florida?

*To Honorable Colin English, State Superintendent of Public Instruction:*

A review of the history of laws authorizing the state to provide textbooks discloses that Section 683 R. G. S. 1920, Chapter 10254, Laws of Florida, Acts of 1925, and Amending Acts—Chapter 17251, Acts of 1935, and Chapter 18133, Acts of 1937, all provide for and relate to the use of textbooks in the "free public schools" or the "public free schools" of the State of Florida.

Section 1 of the last mentioned Act, which was amended and revised as Section 713, Chapter 19355, Acts of 1939 (School Code), is carried forward as Section 233.13, Florida Statutes, 1941, and provides:

"All textbooks which have been or which may hereafter be adopted for use in the uniform system of public schools in the State of Florida shall be furnished by the State of Florida, at the expense of the state, for the use of pupils of such public schools. . ." (Emphasis supplied).

It is my opinion that school officials have no authority under any circumstances to provide state-owned textbooks for use in schools that are not "in the uniform system of public schools" of the State of Florida.

**TRANSPORTATION OF SCHOOL CHILDREN**

December 29, 1944.—044-351.

**BOARD MEMBER—PAYMENT FOR DRIVING SCHOOL BUS**

**QUESTION:** Does the law permit the payment of a County School Board member for driving a school bus, making repairs to school property in the county, and also providing other similar services in connection with the school program, for which he is compensated over and above the compensation received by him as a member of the Board?

If the County Superintendent countersigns a warrant to pay a School Board member for such services, what would be the liability of the County Superintendent under such circumstances?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 234.20, Florida Statutes, 1941, prohibits a School Board member or District Trustee from being a school bus driver or a contractor for transporting school children in the county in which he holds office. Section 230.23 (12) (i) provides that no contract for supplying materials, supplies, or services to the county school system shall be made with any member of the County Board, Superintendent or Trustees, etc. Accordingly, claims by a Board member for driving a bus or for materials, supplies or services rendered to the schools are unlawful claims and may not be paid with school funds.

Section 237.23 (2), Florida Statutes, 1941, as amended, provides, among other things, that every member of the County Board who votes to approve or pay any illegal charge against the school funds, and any Chairman of the County Board or County Superintendent who signs a warrant for the payment of such claim shall be personally liable for the amount, and shall be guilty of malfeasance in office and subject to removal by the Governor. Under Section 237.23 (1), as amended, the County Superintendent is also guilty of malfeasance and misfeasance in office and subject to removal if he recommends payment from school funds without having exercised due diligence in assuring himself that payment of a claim is lawful, etc., as provided in Section 237.02 (6). Section 237.23 (2) also requires the State Auditor to report such unlawful payment to the Comptroller, who, in turn, reports to the Attorney General, and the latter, through his office or through a State Attorney, institutes proceedings against the Board member or Superintendent who has violated these provisions. The section also authorizes any taxpayer to institute such suit in the event action is not taken by the Attorney General or State Attorney within ninety days after the Comptroller's report.

December 11, 1944.—044-344.

**COUNTY SCHOOL BUSES—USE TO TRANSPORT PUPILS OF PAROCHIAL SCHOOLS**

**QUESTION:** May a County Board of Public Instruction legally transport, in county-owned equipment, children of public school age, to a denominational or parochial school, if the school involved reimburses the county for the cost of this service?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In answer to your question I am assuming, and understand the facts to be, that there is available space on the busses and that the private or parochial school has assumed no obligation to their school children or to the latter's parents to transport the children to the private school and that payment for the transportation by the school rather than by the child for each trip is only a matter of convenience between the parties.

Section 4, Article XII, of the Constitution, relating to State School Funds; Section 9, Article XII, relating to school taxes and Sections 10 and 17, Article XII, relating to Special Tax School District Funds and bonds, severally provide that all of such taxes and funds shall be used "for the exclusive use of the public free schools."

Section 6, of the Declaration of Rights, is as follows:

"No preference shall be given by law to any church, sect, or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

Section 13, Article XII, of the Constitution, is as follows:

"No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school Fund to any other than school purposes; Nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school."

I have carefully considered all of the provisions of the Constitution as they relate to the question submitted.

Proceeding to the statute relating to the subject, Section 234.01, Florida Statutes, 1941, requires the County Board to provide transportation "for each pupil who should attend the public school" when such transportation is necessary, etc. Section 234.03 (1) requires the County Board to secure insurance covering liability for damages on account of bodily injury "to pupils legally enrolled in the public schools. . . ." Section 234.10 (1), dealing with designation of bus routes, reads as follows: "Each route shall be planned and adjusted to the capacity of the bus, and insofar as is practicable the normal capacity of each bus shall be used."

It seems from these sections of the statutes that the legislative design contemplated only transportation of children attending a public school and I believe the better answer is that there is an implied exclusion of permission to transport anyone other than those attending the free public schools. The rules of construction that the special mention of one thing in a statute implies the exclusion of the other, and that implied prohibitions of law are as effective as express prohibitions are applicable.

It is easy to understand that county school authorities, having complied with the above statutes, including additional insurance to cover transportation of such nonpublic school pupils, and actuated, as no doubt they have been in all such cases, by the natural human instinct to be neighborly and pick up a person, particularly a child, and give him a lift, and by a patriotic effort to save gasoline, and perhaps actively conscious of the great importance to the State of facilitating the education of all of the citizenry, and remembering that taxes paid by the parents of these children have helped pay for the school busses, and the full cost of such transportation being paid, and no one being injured to any extent whatever, might feel that such transportation does not violate the spirit of the statutes. But, notwithstanding all of these considerations and the resulting appearance that such children may have a strong moral right to the privilege of such transportation, there is the implied statutory prohibition, and accordingly it is my opinion that such transportation in county-owned busses would be a violation of the statutes.

## FINANCE AND TAXATION

December 7, 1944.—044-340.

### SCHOOL DISTRICT ELECTIONS—CONSOLIDATION

QUESTION: May the County Board of Public Instruction call a special election to determine whether two school districts shall be consolidated under Section 236.32 (3) (a) (b), Florida Statutes, 1941, without a petition for such election signed by 35 percent of the qualified electors residing in such districts?

*To Honorable John M. Allison, County Attorney, Hillsborough County, Tampa, Florida:*

I find I have not rendered an opinion on that subject.

Subsection (a) of the above statute authorizes the Board of Public Instruction, acting on its own motion, to call such an election. Subsection (b) provides a means whereby the qualified electors of the two districts may require the Board of Public Instruction to call such an election, even though the Board did not approve of it. The two subsections are not in conflict; they supplement each other. Either procedure may be followed. The Board of Public Instruction may call the election without the petition of the qualified electors mentioned in Subsection (b).

September 28, 1943.—043-256.

#### SCHOOL DISTRICT ELECTIONS—PROCEDURE

QUESTION: 1. How many times should notice be published of holding of the regular biennial school district election, as provided for in Section 236.32 (2), Florida Statutes, 1941?

2. May the notice of the regular biennial election be combined with the notice and call for the reorganization election?

3. Does the form of ballot set forth in Section 236.32 (4) (g) call for separate ballots for each question?

4. Are the results of the election referred to in Section 236.32 (4) (j) determined by a majority of the votes cast in the entire territory to be included in the reorganized district, or must a majority of the votes in each of the old districts be in favor of the reorganized district in order for the old districts to be consolidated into one new district?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. Section 3, Chapter 20970, Acts of 1941, (Section 230.39, Florida Statutes, 1941), amended Section 439, Chapter 19355, Acts of 1939, relating to procedure for conducting biennial school elections by providing that "the notice of election shall be published once each week for four successive weeks, beginning not more than 45 days nor less than 30 days prior to the date set for the election." Such provision requires four publications.

2. Section 236.32 (4) (f) provides for the period of publication and contents of the notice of election for reorganization. It is my opinion that these notices should be published separately.

3. No. The form of ballot provided for by said section containing all questions on one ballot should be used. Part 2 may be eliminated as provided by said section, if said question is not to be voted upon.

4. Said Paragraph (j) provides in part, "Each district in the territory proposed as a new school district, in which a majority of the qualified electors voting on ballot (1) vote in favor of the organization of the new district as proposed, shall become a part of the new district as hereinafter prescribed." It is my opinion that this provision requires a majority of the qualified electors in each district to vote in favor of consolidation for the old district to become a part of the new district.

August 25, 1943.—043-216.

#### TEACHERS' SALARY FUND—TRANSFER

QUESTION: Has the State Board of Education authority now to approve the transfer of an unexpended balance as of June 30, 1939, credited to Madison County, from the teachers' salary portion to the transportation portion of the Teachers' Salary Fund?



*To Honorable Colin English, State Superintendent of Public Instruction:*

Chapter 22378, Laws of Florida, Acts of 1943, specifically authorizes the State Treasurer to transfer any balance in the State Teachers' Salary Fund standing to the credit of Madison County as of June 30, 1939, remaining unexpended at the effective date (June 14, 1941) of Chapter 20970, Acts of 1941, to the transportation portion of credits due said Madison County, on approval thereof by the State Board of Education.

It is my opinion that said transfer is authorized by said Chapter 22378, and that the State Board of Education, under said Act, has the authority to approve said transfer, which approval must be given before the transfer can lawfully be made.

## FINANCIAL ACCOUNTS AND EXPENDITURES

August 9, 1943.—043-233.

### COPYRIGHT ROYALTIES ON FLORIDA GUIDE—DISPOSITION

QUESTION: What disposition should be made of the proceeds of a check for \$201.16, payable to the State Department of Public Instruction, same being payment by the Oxford University Press of royalties due on the publication of the copyrighted "Florida Guide" compiled by the Writer's Project of the W P A?

*To Honorable Colin English, State Superintendent of Public Instruction:*

By Chapter 21959, Laws of Florida, Acts of 1943, the legal title to any copyright owned by the State of Florida or any of its agencies was granted and vested in the Board of Commissioners of State Institutions for the use and benefit of the State of Florida.

Accordingly said funds should be deposited in the General Revenue Fund of the State.

In order to conform to said statute, said copyright should be assigned and transferred of record to the Board of Commissioners of State Institutions of the State of Florida; and said Oxford University Press should be notified to make any and all further payments of said royalties to the Board of Commissioners of State Institutions.

February 12, 1943.—043-46.

### COUNTY BOARD—DEFERRED PAYMENT AGREEMENTS

QUESTION: 1. May a County Board execute with the Federal Government or with any other agency a lease contract which would bind it to pay a certain sum during future years, except as that contract might be for paying a loan incurred in accordance with the provisions of Section 1085 of the School Code?

2. May a County Board enter into an agreement to pay a sum of money at some future date without such agreement becoming equivalent to a loan under Section 1085 which must be approved by the State Board?

3. May a County Board bind itself to pay at some future date more than the amount authorized under Section 1085 of the School Code, regardless of whether such a loan might or might not be approved by the State Board?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I conclude that the proposed agreement is in effect a contract of purchase by which the County Board seeks to purchase a high school building

erected by a Federal Agency in a special tax school district, and to obligate itself for the sum of \$35,000.00 with interest on deferred payments, all payments to be made from the County School Fund.

1. It is my opinion that this question must be answered in the negative. Such a deferred payment contract would be the equivalent of issuing and using the proceeds of serial bonds for the construction of a high school in a special tax school district, and said bonds being paid at maturity from the County School Fund.

In *Leonard v. Franklin*, 84 Fla. 402, 93 So. 688, the constitutionality of a legislative act was questioned which authorized the issuance of long term obligations for the building of high schools in four special tax school districts. In holding the authorizing act invalid, our Supreme Court said:

"While the county school fund should be properly disbursed for school purposes throughout the county, the Constitution does not contemplate the pledge or use of such fund in the manner provided in the act here considered.

"The provisions of the Constitution in definitely fixing the sources of the county school fund and in expressly providing that it shall be used 'solely for the maintenance and support of public free schools' clearly do not contemplate that such fund shall be used for a bonded indebtedness of the county to aid school districts of the county to erect high school buildings in such districts. Added Section 17 provides for bonds for school purposes to be issued by special tax school districts, and the various limitations contained in Article XII clearly imply that the county school fund is not to be issued to pay the principal and interest on a long-time indebtedness incurred for school district purposes. (Citing cases)."

The principle is well established that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different way. See *Weinberger v. B. P. I. St. Johns County*, 93 Fla. 470, 112 So. 253, 256 and *State v. Board of County Commissioners*, 147 Fla. 278, 3 So. 2d. 360, 362. In *State v. B. P. I. Dade County*, 126 Fla. 142, 170 So. 602, our Supreme Court said:

"By its terms the use of funds raised under article 12 is limited 'solely' and 'exclusively' to public free school purposes. The consistent practice has been to use the county school fund for current maintenance purposes, the special tax school district fund raised by section 10 for maintenance, building, repair, library, and text-book purposes, and the funds raised by section 17 for interest and retirements on bonds for building, furnishing, or otherwise permanently improving school buildings and grounds. Such a practice was the inevitable result of directions incorporated in article 12 as originally adopted and as amended from time to time to meet the demands of the public school system. . .

"It would be competent for the Legislature to direct the use and appropriation of the county school fund so long as done 'solely for the support and maintenance of public free schools,' but the Legislature is without power to appropriate general county funds for school purposes, or to appropriate county school funds for buildings in special tax school districts. . ." (Emphasis supplied).

As regards the County School Fund, the whole policy of our public school system is that the operation of such schools is to be based on each year's requirements and facilities. Under its authority to direct the use of School Funds for school purposes, the Legislature by Section 237.25 authorized creation of indebtedness for more than one year, but in so doing specifically limited the school purposes and the period for which indebtedness may be incurred, as follows: (1) long term school district bonds; (2) tax anticipation notes; and (3) "Indebtedness may be incurred for certain purposes, as authorized under Section 237.27 (Section 1085 School Code), for a period not to exceed four years."

Further it is my opinion that the County Board has no authority to create obligations for more than said statutory period and any of such must also come within the other limitations of said Section 237.27.

2. Obligations incurred by the County Board under Section 237.27 (Section 1085 School Code) may be a loan or other extension of credit, but such must be approved by the State Board. Paragraph 4 of said section provides in part:

"When in its opinion there is any doubt regarding the merit or justification of the proposal, or regarding the ability of the county board to retire the obligations proposed, the state board shall reject the proposal and the county board shall not incur the obligation as proposed."

3. The authority and powers of the County Board are limited by the statute. Irrespective of approval by the State Board, it cannot bind itself to pay at some future date more than the amount authorized and limited by said section.

July 19, 1944.—044-208.

#### COUNTY BUDGET COMMISSION—ADOPTION OF SCHOOL BUDGET

QUESTION: Do Chapters 21989 and 22079, Acts of 1943, relieve the County Budget Commission from the duty of reviewing and adopting the school budget for operating expenses when the County Board determines that the budget, or some item therein, should be increased more than five per cent as compared with the budget for the preceding year or for the year 1940-1941, whichever may be the larger?

*To Honorable Colin English, State Superintendent of Public Instruction:*

There are two Acts of the 1943 Legislature which affect the question, to wit, Chapter 21989, which became a law on June 10, 1943, and Chapter 22079, which became a law on June 14, 1943. The first was an amendment of the School Code and the second an amendment of the taxation law. The pertinent sections of the two chapters appear in the 1943 Cumulative Supplement to the Florida Statutes of 1941, as Sections 237.22 and 193.03, respectively.

Section 237.22, as amended, requires the County Superintendent to submit the tentative budget to the County Board and the Board is required to consider, revise if necessary, approve the budget, and submit it to the Budget Commission. It is then required that the Budget Commission consider and adopt the budget by July 31, returning two copies to the County Superintendent for transmission to the State Superintendent. Both of said copies shall be certified by the Chairman and Secretary of the Budget Commission as true and correct copies of the budget as adopted by the Budget Commission. Section 237.22, Florida Statutes, 1941. At the same time that the Board submits its approved budget to the Budget Commission, the County Board proceeds to carry out the requirements of Subparagraph (4) (a), (b), and (c) of Section 193.03, Florida Statutes, 1941. The State Superintendent then makes his report and recommendation to the County Superintendent and simultaneously mails to the County Budget Commission copies of all correspondence connected therewith. Other provisions of the amended statute are not pertinent to the inquiry.

Section 193.03 as amended, is a part of the Chapter dealing primarily with tax assessments, etc., and relates to other budgets as well as school budgets. This amended section requires the County Board to submit its proposed budget to the Budget Commission in lieu of submitting the same to the State Superintendent of Public Instruction and authorizes the Budget Commission in such cases to approve the increase in the budget if it does not exceed five per cent, etc. If the requested increase is denied the Board may appeal to the State Board of Education. No further reference to the Budget Commission is made in that amended Act. It will be

noted that this amended section provides that "... the budget-making authorities of such counties shall submit their proposed budget to such budget commission ..." making no distinction between budgets proposing an increase of more than five percent or less than five percent.

I have considered the question of whether Section 193.03, the later Act, repeals Section 237.22 by implication. Our Supreme Court has repeatedly held that repeals by implication are not favored and will not be deemed to have been intended unless that intention is clearly manifest. The Court has also held with equal frequency that if two or more statutory provisions relate to the same subject matter they should be construed, if possible, so as to give effect to all. The two amended Acts are not in complete harmony, but it is my opinion that there is no clear repugnancy between them.

Summarizing what has been said above, it is my opinion that neither of these Acts of the 1943 Legislature relieves the Budget Commission from the duty of reviewing and adopting a school budget where the increase requested exceeds five per cent, or in any other case.

August 23, 1943.—043-225.

#### COUNTY BUDGET COMMISSION—CONTROL OVER COUNTY BOARDS

QUESTION: 1. Is Chapter 22270, Special Acts of 1943, effective to give the Duval County Budget Commission jurisdiction over the budget of the Board of Public Instruction to the exclusion of the supervisory power of the State Superintendent and the State Board of Education?

2. If question 1 is answered affirmatively, does Section 54 of Chapter 22079 prohibit the approval of the budget, by said Budget Commission, containing an increase of more than five per cent, as compared to the budget on the preceding year, or for years 1940-41, whichever may be the larger?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. As expressed in the title, Chapter 22270 amends Chapter 14678, Acts of 1931. The latter Act, which created a Budget Commission in counties of 150,000 or more, specified that it should be the duty of said Budget Commission to amend, fix and adopt the budget of all County Boards. County Boards of Public Instruction are specifically referred to in said Act as being subject to such Budget Commission control.

Said Chapter 22270, as also appears by the title, amended Chapter 20722, Acts of 1941. The pertinent part of the latter Act appears in Section 54 thereof to the effect that if the proposed budget should be increased or decreased the budget of the Board of Public Instruction should be submitted to the State Superintendent for his approval.

Specific reference being made in the title of Chapter 22270 to the amending of said Chapters 14678 and 20722, such is evidence of the intention of the Legislature that the full authority and control granted Duval County Budget Commission by Chapter 22270 over the budget of all County Boards of Duval County should prevail and take precedence over the provisions of said Chapters 14678 and 20722.

As to Chapter 22079, which became effective after Chapter 22270, it is my opinion that said Special Act prevails and is the controlling law as to the making and finality of budgets by the Duval County Board.

2. Chapter 22270 is effective to give full and final authority to the Duval County Budget Commission for all purposes and said Budget Commission is not subject to any limiting provisions of Chapter 22079—the General Act.



February 14, 1944.—044-52.

#### INVESTMENT—CURRENT SCHOOL FUNDS.

**QUESTION:** May a County Board of Public Instruction purchase United States War Bonds, from funds in the county school budget under account "Reserve for Cash Balances To Be Carried Over," authorized under Section 237.09(1), Florida Statutes, 1941?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Under Section 237.09(1), Florida Statutes, 1941, the county school budget may contain a reserve designated "Cash Balance To Be Carried Over," constituting an amount not exceeding 20 per cent of the taxes estimated for such budget. The section fixes the purpose of this reserve for paying expenses the next succeeding fiscal year between June 1 and November 13, the time when taxes to be levied for the succeeding year's expenses will begin to be available.

I have carefully studied this question, and in doing so have examined the authority of County Boards of Public Instruction as set forth in Chapter 230, Florida Statutes, 1941.

County Boards of Public Instruction have broad powers to provide for the financing and expenditure of county school moneys. If, as a result of this program, such Boards find they have money on hand which cannot be used by them immediately, and if it appears that such money may not be needed for any definite period of time, it would then be proper for such Board, by resolution definitely setting forth the lack of need for the money for a definite period of time, to provide for the purchase of any obligation guaranteed by the United States Government convertible at approximately the time the money will be needed by the County Board to carry out its program; provided that the obligations are such that when the County Board needs such money the obligation can be converted into cash without any loss to the county.

March 11, 1944.—044-75.

#### REFUNDING PLAN—BAY COUNTY

**QUESTION:** What are the requirements for resolutions proposing a program for refunding school indebtedness, including notes, in order to meet the requirements of law and rules and regulations of the State Board of Education?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Commenting first upon the resolution proposing a program of refunding certain indebtedness, it is my opinion that this resolution does not meet the requirements of law or rules and regulations of the Board of Education, in the following respects:

1. Section 237.28, Florida Statutes, 1941, is very definite with regard to a plan for retiring indebtedness that is proposed to the State Superintendent for his consideration. It provides that the County Board shall propose a plan for retiring indebtedness so that no creditors having a valid claim will be given a preferred status, and that the plan show the funds needed for operation of schools, the amount of other obligations which must be met, the funds needed for the school year, and funds that can be spared for the retirement of the indebtedness.

This resolution does not meet this specific requirement and therefore you are not in a position to exercise your discretion, as there are not sufficient facts there for you to act upon. It is my opinion that the plan must be amended to show such facts in order that you may exercise your discretion as State Superintendent in approving or disapproving the plan.

I am not attempting to pass upon your discretion as to whether the plan proposed is, as a matter of judgment, good or bad, but unless the plan shows these things and shows a feasible and practicable plan for the retirement of the indebtedness, the issuance of bonds thereunder cannot be properly validated.

2. In addition to the plan for refunding the indebtedness due the Board of Administration, proposed plans for refunding other indebtedness in the same class are set out. I have not made a study to determine whether or not the plans set out are such as will put each creditor on an equal basis, but this must appear. The exchange of the \$9000.00 in refunding notes cannot be approved until the creditors, as set out in the plan, are bound to accept securities which will put all such creditors on an equal basis. Otherwise you may have permitted the exchange of securities, which have pledged for their payment funds which should be available to other like classes of creditors, or other creditors holding securities of the same class refuse to accept a like refunding plan.

3. As to the proposed resolution for refunding, I suggest, in addition to the matters I have already commented upon, which go to the very heart of the plan itself, that the following changes be made:

(a) In the resolution, second paragraph and third line, after the figures "1941" add "rules and regulations adopted by the Board of Education."

(b) Add as paragraph (c) to "3" the following: "That the plan submitted to the State Superintendent pursuant to Chapter 237, Florida Statutes, 1941, and the Rules and Regulations adopted by the State Board of Education, show that no creditor is given a preferred status because of such refunding, and also show the funds needed for operating the school on the most economical basis practicable; the amount of any other obligations which must be met each year, the total funds available each year for a reasonable school program, and the funds that can be reasonably spared for retirement of indebtedness without needlessly handicapping the school program and which can be budgeted each year for the retirement of such indebtedness."

(c) I suggest also that there be included in the resolution a plan for retiring other indebtedness in the same class so that there is a showing that no creditor is given a preferred status.

(d) In Section 3, sixth line thereof, strike the words "and 237.33" as the plan proposed in the main resolution does not now appear to be under this section.

(e) In Section 5 of this resolution appears a pledge to levy a separate and special tax for payment of these particular refunding notes, to be used solely for the principal and interest of these notes. Due to the fact that payment of these securities is limited to levies under Section 8, Article XII, of the Constitution, such a pledge for the payment of these particular notes is invalid without including in this pledge that the principal and interest of like securities may also be paid out of this fund.

(f) Objection (e) also applies to Sections 6 and 7 of the resolution.

(g) In the form of the note on page 5, second paragraph, line 3, strike the words and figures: "Chapter 132 of the Florida Statutes, 1941, and Section 17 of Article XII of the Constitution" and substitute therefor: "Chapter 132, and Section 237.28, Florida Statutes, 1941, supplemented by the Rules and Regulations of the State Board of Education and Section 8, Article XII, of the Constitution of the State of Florida."

(h) On page 6, second paragraph, line 5, after the words "Constitution of Florida" insert the following: "To the extent per-

mitted by Section 8, Article XII of the Constitution of the State of Florida."

(i) The resolution does not provide for form of interest coupon or form of validation certificate. If it is contemplated that coupons for interest are to be attached a form should be provided, and if the notes are to be validated by legal proceeding, a form of validation certificate should be provided.

(j) I suggest further, but do not require, that a section be added to provide for an escrow agent to act for the Board and the holders of the securities to be refunded, and to provide for the employment of necessary counsel for carrying out legal proceedings. Such machinery must be provided to make exchanges and this should be worked out with the creditors.

April 21, 1944.—044-130.

#### SCHOOL BUSES—PURCHASE

**QUESTION:** Does a County Board of Public Instruction have the authority to execute a retain title contract containing a repossession clause upon default?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Inquiry reveals that the subject matter is limited to school busses.

The manner and method of purchasing school busses, when funds are not provided in the current budget, is expressly provided by Section 237.27, Florida Statutes, 1941. Such section provides that under certain conditions as provided therein the County Boards may issue anticipation warrants and use the proceeds for purchase of school busses.

Section 237.25, Florida Statutes, 1941, provides as follows:

"Indebtedness for school purposes may be incurred only as follows:

3. Indebtedness may be incurred for certain purposes, as authorized under Section 237.27, for a period not to exceed 4 years."

If funds for purchase of school busses are properly provided for in the current budget such expenditure contemplates a cash purchase. However, if the plan for the purchase of such school busses is to extend beyond the school fiscal year, then the plan provided by Section 237.27, Florida Statutes, 1941, mentioned above is exclusive and the County Board would be without power to purchase school busses under contract.

Those who drafted the School Code evidently recognized the doctrine announced in 33 Am. Jur. Liens, No. 14, that the pledging or lien of public property by mortgage is against public policy and is void, and provided for this method of financing school equipment.

For the reason stated, it is my opinion that a County Board of Public Instruction has no authority to enter into a retain title contract for purchases of school busses, but on the contrary is not permitted to do so, there being specific authority for obtaining money and purchasing such equipment on a cash basis.

#### RETIREMENT SYSTEM FOR TEACHERS

November 26, 1943.—043-316.

#### BENEFICIARY—ELIGIBILITY FOR WIDOW'S PENSION

**QUESTION:** 1. Is a teacher receiving retirement allowance from the Teachers' Retirement System also entitled to receive the widow's pension provided for by Section 1, Chapter 20914, Acts of 1941?

2. If she is not entitled to receive both, then may the applicant make the choice as to which one she will receive?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In effect your first question poses the question of whether or not a person may receive two pensions from the State of Florida, and I say pensions for the reason that since the retirement allowance from the Teachers' Retirement System is supplemented by State Funds, it is in the nature of a pension and I believe that the same law would be applicable to the two claims that are being made. Although I realize that the Teachers' Retirement Act speaks of the benefit as a pension as well as an annuity, see Sections 238.01(16), 238.01(18) and 238.07(2) (b) and (c), Florida Statutes, 1941, and such allowances can only be acquired by a teacher's becoming a member of and making certain contributions to this Retirement System, I believe that the purpose of both acts was the same, i.e.: to prevent the teacher or the widow of the teacher from becoming a public charge.

The two acts involved do not lend much aid in a proper construction of same except that it is provided in Section 231.52 that "nothing herein contained shall be so construed as to allow such pension to be paid to any widow where such widow of a deceased pensioner under this section receives a like pension in her own right as a retired school teacher." This certainly indicates that the beneficiary under this particular section is not to receive any like pension. The word "like" has been judicially defined to mean analogous, equal in quality, equal in quantity or degree, exactly corresponding, having resemblance, having the same or nearly the same appearance, qualities or characteristics, resembling the same in quantity, amount or extent, similar to. See 37 C. J. 662.

It might possibly be said that when the pension provided for under Section 231.52 is claimed by a person receiving retirement pay under the Teachers' Retirement System, such benefit was similar to that allowed by Section 231.52. However, I do not think that it is necessary to base my opinion upon the construction alone of the word "like" so I have turned to the authorities in our own state in order to determine whether or not we have had any judicial interpretation of either of these statutes or any similar ones where a person is claiming under two different statutes that awarded a benefit or a pension and I have not been able to find any cases in the State of Florida which were at all helpful. As a matter of fact, I do not find where any Court in the United States has passed upon this direct question.

In the case of *Decatur v. Paulding*, 14 Pet. (U. S.) 497, 10 L. ed. 559, the question was considered by some of the Judges who were then upon the bench of the Supreme Court of the United States and the majority opinion went off on a procedure question rather than the question which was presented as to whether or not a person was entitled to two pensions. Those Judges who did indicate their thoughts in the matter said that they did not believe that any person would be entitled to two pensions unless it was clearly provided in the Act awarding the same. I find that the author of the work on pensions in 48 C. J. 789 makes this statement: "In the absence of express provision to the contrary, the pension laws will be so interpreted as to prevent any person from receiving a double pension." He cites as authority several opinions of the Attorney General of the United States which I have read and they bear out the text. He also cites *Decatur v. Paulding*, *supra*, as sustaining this view.

Taking into consideration the views of the authorities submitted by the text writer in the article on pensions in *Corpus Juris* that I have pointed out, and the thought that pensions or retirement allowances are made for the purpose of preventing faithful employees from becoming public charges, and the amounts usually fixed are based upon what the Legislature believes will be reasonable allowances, I am of the opinion that it was not the intention of our Legislature that any person should



receive simultaneously either two retirement compensations or a retirement compensation and a pension or two pensions, however you might term the Act under which the claims are made. Certainly if the Legislature felt that the retirement pay was not sufficient to prevent its beneficiary from becoming a public charge it would have increased the same and when such change was not made in the particular Act under which the benefit was being paid I think that we must indulge in the presumption that the Legislature felt that it was sufficient for that beneficiary and did not intend such a beneficiary should receive two payments from the State in order that said beneficiary would not become a public charge.

I do not believe that it would be fair for one person who has served the State faithfully to receive a lesser amount for the same service than some other person would receive because such other person could also claim under another Pension Act. A person who teaches in our school system is entitled by virtue thereof and the payments that she makes, to said retirement pay because of her particular service to the State, whereas a person under Section 231.52 is entitled to the benefits thereunder by virtue of the fact that she is a widow of someone who served the State faithfully for the period of time mentioned in this section or in Section 231.50, which provides for the benefits for that particular teacher, and since the beneficiary under Section 231.52 has no claim upon the State by virtue of her services, I think it can be safely said that the only reason for the allowance is to prevent her from becoming a public charge.

As to your second question, I am of the opinion that she has the election as to whether or not she will accept retirement allowances under the Teachers' Retirement System or the widow's pension as provided under Section 231.52, Florida Statutes, 1941. In the case that I have cited of *Decatur v. Paulding*, the members of the Court who indicated that a double pension was not proper also indicated that the widow should have the election, and with this I agree and so answer your second question.

October 14, 1943.—043-283.

#### BENEFITS—ELIGIBILITY

QUESTION: 1. Is a teacher in an institution of higher learning who executed a Nonelection and Waiver blank by December 1, 1941, and who did not change his mind by June 30, 1942, eligible under the 1943 Amendments to become a member of the Retirement System with credit for prior service?

2. Is a member of the Teachers' Retirement System who has been called into the military service of the United States eligible to contribute during the period of his military service on the basis of \$1,500.00 per year if such a teacher made this amount of money prior to his entrance into the military service?

3. Are the Amendments provided by House Bill No. 251, Chapter 21971, approved by the Governor June 10, 1943, superseded by Senate Bill No. 458, Chapter 22062, approved by the Governor June 11, 1943?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

Section 2, Chapter 22062, Acts of 1943, which amended Section 238.05, Florida Statutes, 1941, grants the privilege of membership in the Retirement System to anyone not eligible when the system became effective, who served as a "teacher" as redefined, during the school year of 1941-42 and 1942-43; and extended the time for filing an election not to be covered by the Retirement System to December 1, 1943.

Section 238.05 (2) was re-enacted by Chapter 21971 and 22026, Acts of 1943, and provides: "A teacher whose membership in the Retirement System is contingent on his own election and who elects not to become a member may thereafter apply for and be admitted to membership."

The same paragraph provides that "No such teacher shall receive prior service credit unless he is admitted to membership as of a date before the first day of July, Nineteen Hundred Forty." This provision was re-enacted unchanged by Chapter 21971 and 22062.

However, Section 238.06 (3), relating to allowance of creditable service, which had the same provision, was amended by Chapter 20749, Acts of 1941, by adding thereto, "Or who becomes a member before the first day of July, Nineteen Hundred Forty-two," and Chapter 22062, Acts of 1943, further amends said section by adding "Or who becomes a member before the first day of July, Nineteen Hundred Forty-four." It is my opinion that if the teacher withdraws his election and waiver and becomes a member and makes application for prior service certificate before July 1, 1944, he is entitled to credit and a certificate for prior service.

Section 238.05 (3), Florida Statutes, 1941, as amended by Chapter 20749, Acts of 1941, and Chapter 21971, and Chapter 22062, Acts of 1943, specifically provides for the continuation of membership by one who has entered the armed services "On the basis of his last previous annual salary as a teacher." If he makes the application to continue membership, in my opinion he is eligible to contribute during service in the armed forces on the basis of \$1,500.00 per year if his salary equaled that amount prior to entrance in the service, as the Legislature intended to preserve all benefits to teachers, to and for those in the armed services.

This question has been raised in a suit filed in Leon County, Florida, seeking a declaratory decree construing said Acts and a court decision as to which Act, in toto or parts of which Acts, are the controlling provisions of law. I will therefore withhold my opinion on said question pending the Court's determination of this case.

August 9, 1944.—044-229.

#### DISBURSEMENT OF NONRESIDENT MEMBER'S CONTRIBUTIONS

**QUESTION:** How may the Teachers' Retirement System lawfully disburse accumulated contributions of a former member of the Retirement System when such former member was a nonresident, designated no beneficiary, died intestate, and there has been no administration of his estate?

*To Honorable S. C. Bigham, Auditor, Teachers' Retirement System:*

Section 238.07 (6), Florida Statutes, 1941 requires payment of such contributions to a decedent member's executors or administrators where he failed to designate a beneficiary. If the amount of the accumulated contributions were sufficient to justify it, administration of the decedent's estate might be had and an administrator appointed, under Section 732.44 of the Statutes, or under proper circumstances an order of no-administration under Chapter 735 of the Statutes might be obtained in the proper County Judge's Court in this State, or the money might be held for three years and in the absence of administration within that time it could lawfully be disbursed to the decedent's heirs under Section 734.29.

The small amount involved in your present case, \$75.51, and the other circumstances, would scarcely justify the expense of either of the above court procedures or the holding of the money for three years, and I think that you would be warranted in disbursing the money to the heir or heirs of the decedent without any court proceedings. The paper signed by the County Court Clerk, Washington County, Tennessee, is not an order of no administration. I have prepared a form of affidavit to be executed by the widow who, I understand, is a resident of the state of Tennessee. When this is properly completed, it is my opinion that you may make distribution to the heirs as may be disclosed by the affidavit. In forwarding the affidavit, caution the widow to make whatever changes may be necessary in order that the affidavit may recite the truth. If you wish, I shall be glad to examine the affidavit upon its return.

October 6, 1943.—043-261.

#### ELIGIBILITY AND PAYMENT

**QUESTION:** Is the teacher mentioned in Chapter 22077, Laws of Florida, Acts of 1943, entitled to receive a pension and if so from what fund should such pension be paid?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 4, Article IX, Florida Constitution, provides: "No money shall be drawn from the treasury except in pursuance of appropriations made by law."

In *State vs. Lee*, 163 So. 859, the Court held, "An appropriation of money is the setting it apart officially out of the public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and use that money, and no more, for that object, and for no other."

In *State vs. Amos*, 122 So. 8, our Supreme Court refused mandamus for payment of a pension where the authorizing act failed to make any appropriation therefor.

Said Chapter 22077, Acts of 1943, failed to make any appropriation for the pension granted. It is therefore my opinion that no payment can be made under said Act from any fund of this state.

In *State ex rel. Williams, vs. Cone*, 196 So. 820, Chapter 19600, Acts of 1939, a similar Pension Act was considered, in relation to Section 3, Article XIII, Florida Constitution, adopted in 1936, which provides that "The respective counties of the State shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity, or misfortune, may have claims upon the aid and sympathy of society; . . ." Our Supreme Court stated: "As we construe the above quoted provision, it precludes the enactment of statutes or the appropriation of funds for the purpose of carrying into effect such statutes as that here under consideration. Such cases as this are thereby left to be taken care of by such provisions as the county may make in that regard." And said Court denied mandamus to the relator against the State Board of Pensions to compel said Board to place relator's name on the state pension roll under the provisions of said Chapter 19600.

Said teacher may be entitled to old age assistance under Chapter 412, Florida Statutes, 1941. Being sympathetic with her case, may I suggest that an application be made in her behalf for the benefits of said chapter?

March 27, 1944.—044-98.

#### EMPLOYMENT—RETIRED TEACHERS

**QUESTION:** May a County School Board legally pay, for services as a substitute teacher, a person over 70 years of age who has been retired under the compulsory Teachers' Retirement Law and who receives compensation as a retired teacher?

*To Mr. Orvil L. Dayton, Jr., Attorney at Law, Dade City, Florida:*

Section 238.07, Florida Statutes, 1941, Subsection (1) (b), makes mandatory the retirement of certain teachers who reach the age of 70 after the expiration of the school year.

Under the provisions of Section 238.05, Florida Statutes, 1941, as amended by Section 1, Chapter 21971, and Section 2, Chapter 22062, Laws of Florida, 1943, unless a teacher has waived the benefits as prescribed therein, employment by a School Board places such teacher within the provisions of the law relating to the Retirement System. When a teacher has claimed the benefits of said section and is retired thereunder

such teacher is then, by law, prohibited from again being employed and paid as a teacher in the public school system.

It is therefore my opinion that a person retired and receiving compensation under the Teachers' Retirement System, having reached the age of 70 and having served out the school term thereafter, may not be employed by the county as a teacher.

April 8, 1944.—044-121.

#### EMPLOYMENT WHEN OVER SEVENTY

**QUESTION:** A teacher who will be seventy years of age on August 1, 1944, and who has accepted the provisions of the Teachers' Retirement System now in operation in this State, has requested to be reappointed for next year. She will not be seventy years of age at the beginning of the school year, July 1, 1944. May this teacher legally be employed to teach during the school year beginning July 1, 1944, and ending June 30, 1945?

*To Honorable J. T. Diamond, Secretary, State Board of Control:*

Section 238.07 (1) (b), Florida Statutes, 1941, provides, that any member (i.e. teacher under the system) who has attained seventy years of age before the first day of July 1941, or who attains seventy years of age on or after said date shall be retired forthwith; provided however, that with the approval of his employer he may remain in service until the end of the school year following the date on which he attains seventy years of age.

The words "school year" as used in the above noted Section 238.07 (1) (b) are not defined in the Teachers' Retirement System Law (Chapter 238, Florida Statutes, 1941). However, reference is made to certain definitions in the School Code (Chapters 227-237, Florida Statutes, 1941); and while Chapter 238 is not a part of the School Code and the terms in the School Code are applicable to elementary and secondary schools, such definitions tend to shed light on the words "school year" as used in Chapter 238. Section 227.13 (24) defines "school year" as comprising the period during which the schools are regularly in session during any school fiscal year beginning on or after July 1st and ending on or before the following June 30th. Section 227.13 (25) provides that "school fiscal year" shall begin July 1st and end the following June 30th. In my opinion, "school year" as used in Chapter 238 is to be given the meaning as defined in the School Code.

But whether we consider the words "school year" as used in the above cited Section 238.07 (1) (b) as being the school fiscal year or as being the regular scholastic year, in my opinion this teacher, with the approval of her employer, can continue in service during the scholastic year of 1944-45 ending on or before June 30, 1945.

August 7, 1944.—044-227.

#### EXAMINATIONS BY MEDICAL BOARD—FEES

**QUESTION:** What fees are payable to the Medical Board for medical examination of members of the Teachers' Retirement System who are applying for, or who are on, disability retirement?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

It appears that a dispute has arisen between the Board of Trustees and the Medical Board as to the amount owing to the latter for passing upon medical examinations of members applying for disability retirement and of members who are on disability retirement, and that the Medical Board contends that the Trustees agreed to pay them fifteen dollars for each



examination, that is, fifteen dollars for the examination accompanying the original application and a like amount on each annual or subsequent examination, whereas the Board of Trustees insists that the fee of fifteen dollars was to cover the original and all subsequent examinations.

The statute in regard to the duties of the Medical Board is:

"Section 238.04 **Medical Board.**—The Board of trustees shall employ a medical board of three physicians, not eligible to participate in the retirement system.

"The medical board shall arrange for, and shall pass upon, all medical examinations required under the provisions of this chapter, shall investigate all essential health or medical statements, and certificates by or in behalf of a member in connection with his application for disability retirement, and shall report in writing to the board of trustees its conclusions and recommendations upon all the matters referred to it, and perform such other duties as may be required of them by the board of trustees."

Section 238.07 (3) requires a report by the Medical Board when a member applies for disability retirement and Section 238.07 (5) (a) provides:

"Once each year during the first five years following the retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the board of trustees may require any disability beneficiary who has not yet attained his minimum service retirement age to undergo a medical examination by the medical board or a physician or physicians designated by the medical board, such examination to be made at the place of residence of said beneficiary or other place mutually agreed upon."

\* There is nothing in these statutes or elsewhere in regard to fees payable to the Medical Board for such services. It is, therefore, a matter of agreement between the Board of Trustees and the Medical Board.

An examination by the Medical Board at the time of the original application for disability retirement is required by Section 238.04, quoted above. Annual and subsequent examinations referred to in Section 238.07 (5) (a) are optional with the Board of Trustees.

The dispute involves solely a question of fact and the only satisfactory manner of adjusting it is by negotiation. I should suggest that since it is absolutely necessary to make an arrangement with a Medical Board for future examinations, at least on the original application, you might proceed as follows:

1. Determine whether or not the annual and subsequent examinations are necessary.
2. Negotiate a new agreement with the Medical Board as to fees payable for passing upon such examinations.
3. Adjust the pending dispute on the basis of the new agreement.

July 19, 1944.—044-209.

#### MEMBERS OF THE UNIVERSITY OF FLORIDA STAFF

**QUESTION:** Will members of the University of Florida teaching staff, who are absent from the campus for more than two years, lose their prior service credit when they are on leaves of absence granted by the Board of Control for service with the armed forces, the Federal Government, or other employments connected with the war effort?

*To Mr. Harwood M. Dolbeare, President, University of Florida Chapter,  
American Association of University Professors, Gainesville, Florida:*

An opinion of July 3, 1944 (page 280) deals with the loss of prior service credit by a school teacher who engaged in work not connected with the schools for more than two years. In that case the teacher did not have either a military or a professional leave of absence. The above mentioned opinion, however, does not apply to members of the Retirement System who are absent on military or professional leaves of absence.

Your attention is directed to a statement in that opinion that there are certain exceptions having no relation to the situation we were then considering. The exceptions referred to include members absent on military or professional leaves of absence.

Section 238.05 (3), Florida Statutes, 1941, provides that the membership of any person in the Retirement System ceases if he shall be continuously unemployed as a teacher for a period of more than two years, etc., but exempts therefrom a member who ceases to teach for reasons of military or naval service or professional leaves of absence, upon the making of proper application, contributions, etc., as set out in the statute.

The 1943 Legislature amended that section by Chapter 21971, which became a law on June 10, 1943 and Chapter 22062, which became a law on June 11, 1943. In both chapters the exemption was continued in favor of members on military and professional leaves of absence. There is a conflict between the two chapters in regard to the duties imposed upon such absent members in retaining their membership, and a suit is now pending to determine which of the two chapters is controlling. Your question does not involve a determination of that issue, and I refrain from expressing an opinion other than to say that pending a decree in that suit, the safer plan would be to comply with the provisions of Chapter 22062 which gives the member exemption from the two year clause,

"... if he files with the board of trustees, before his next contribution is due, an application to continue his membership during the period of his military or naval service or professional leave of absence; and, provided further, that such person shall be permitted to elect to continue his contribution to the retirement system on the basis of his last previous annual salary as a teacher, during the period of such service or professional leave of absence; and, provided further, that membership service shall be allowed for the period covered by military or naval service or professional leave of absence only if said person elects to and does continue to make his contributions to the retirement system, which contributions shall be paid by such person to the trustees of the retirement system in monthly, quarterly, semi-annual or annual payments in the discretion of such person."

Your question refers to leave of absence "in other employments connected with the war effort." Chapter 21971 makes the exemption applicable to "persons who enter military, naval or other armed services of the nation during a period of war, and for persons who are granted extended professional leaves of absence." Chapter 22062 makes the exemption applicable to a member "who ceases to teach for reasons of military or naval service or professional leave of absence." Both mean substantially the same thing. The employment must be in the military, naval or other armed services and whether other employments connected with the war effort would be covered by the exemption could only be determined by an exact statement of what that other employment may be.

June 3, 1944.—044-162.

#### MEMBERS REINSTATED—BENEFITS

**QUESTION:** Where a beneficiary under the Teachers' Retirement System voluntarily resumes teaching and again becomes a member of the

Retirement System during the war emergency, on retirement subsequent to June 11, 1943, the effective date of Chapter 22062, Laws of Florida, Acts of 1943, should such member's retirement benefit be recomputed using \$1200.00 or using \$1500.00 as the limit of earnable compensation?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

In an opinion of October 1, 1942, printed on page 316 of the Biennial Report of the Attorney General for 1941-1942, I advised that the Board of Trustees, by proper rule, might authorize a retired teacher to again accept a teaching position and at the end of such employment reinstate retirement, and that such authorization might be on the terms and conditions fixed by the Trustees.

The above mentioned retired teacher was retired at the time that the benefit payable was determined by using \$1200.00 as the limit of earnable compensation. By Chapter 22062, Laws of Florida 1943, effective June 11, 1943, such limit was fixed at \$1500.00.

In an opinion of this date I have held that persons retiring subsequent to June 11, 1943, are entitled to an average final compensation determined by computing their earnable compensation on the basis of that paid for the previous 10 years or of those years in service not exceeding \$1500.00.

In the absence of a rule adopted by the Board of Trustees fixing some condition of reinstatement precluding the application of such statute, the reinstated member is entitled to the same benefit of the law as a member who was never retired.

It is therefore my opinion that a beneficiary under the Teachers' Retirement System who voluntarily resumed his membership in the system is entitled to have his benefits computed on his subsequent retirement after June 11, 1943, using \$1500.00 as the limit of earnable compensation unless the Board of Trustees, as a condition of said teacher's re-entry into the system, fixed his benefit as that which he received at the time of his first retirement.

May 25, 1943.—043-121.

#### MEMBERSHIP—ELIGIBILITY

**QUESTION:** 1. Is a teacher, who has reached her minimum service retirement age of sixty years, eligible for membership in the Teachers' Retirement System as a beginning teacher?

2. Does the Board of Trustees of the Teachers' Retirement System have the authority, under the law, to deny the right of membership in the system to a beginning teacher, who is otherwise qualified, because such a teacher has reached her minimum service retirement age of sixty years?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

1. Section 238.05 (1) (b), Florida Statutes, 1941, provides:

"All persons who are teachers on or after the first day of July, 1939, except as provided in subsection (a) hereof, shall become members of the retirement system by virtue of their appointment as teachers."

Said Subsection (a) provides that a certain class of teachers may file an election not to be covered in the membership of the Retirement System.

Section 238.09, which determines the method of financing the Retirement System provides in part by Subsection (1) (a):

"In the case of any member who has attained his minimum service retirement age prior to becoming a member, the proportion

of salary applicable to such a member shall be the proportion computed for the age one year younger than his minimum service retirement age."

This section clearly contemplates that a person who becomes a teacher after attaining sixty years of age shall participate as a member by making contributions to the fund.

The only limitation on membership for a beginning teacher that I find in the Retirement System Law is Section 238.05, which provides by Subsection (4) thereof:

"The board of trustees may, in its discretion, deny the right to become members to any class of teachers who are serving on a temporary or any other than a per annum basis, and it may also, in its discretion, make optional with members in any such class their individual entrance into membership."

It is, therefore, my opinion that a teacher who has reached her minimum service retirement age of sixty years is eligible as a beginning teacher for membership in the Retirement System unless she is serving on a temporary or less than a per annum basis, in which case the Board of Trustees, in its discretion, may deny or make optional the right of a teacher to membership.

2. This question must be answered in the negative. The Board of Trustees may not deny a beginning teacher who has reached sixty years of age the right of membership in the Retirement System unless such teacher is serving on a temporary or less than a per annum basis. To do so would contravene the express provisions of said law which grants such statutory right of membership in the Retirement System to a teacher.

December 21, 1944.—044-355.

#### SERVICE CREDIT—AAA EMPLOYMENT

QUESTION: Is a former County Superintendent, who is a member of the Retirement System, but who accepted full time employment by the Agricultural Adjustment Administration for a certain period and who, during such time was paid exclusively by Federal Funds, but worked out of a County Agent's office during his employment by the AAA, entitled to membership service credit during the time he was with the AAA?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

In your letter of December 12, you state that the Board of Control classifies a County Agent as a member of the Instructional staff of the University of Florida, and, therefore, eligible for membership in the Teachers' Retirement System.

Unless he was a member of the teaching or professional staff of the University or any of the other educational institutions mentioned in Section 238.01(4), Florida Statutes, 1941, which defines "teacher" under the Retirement System, he would not be entitled to membership service credit during the time he was with the AAA. The Board of Control's classification of County Agents as members of the University Instructional Staff does not extend to persons working out of the County Agent's office. Service with AAA does not qualify him. He does not come within the above statutory definition of teacher, and it is my opinion that your question must be answered in the negative.

July 3, 1944.—044-189.

#### SERVICE CREDIT AFTER TWO YEARS' ABSENCE

QUESTION: May prior service credit be given a teacher who is re-employed in the public school system, when more than two years have elapsed since he last served in that capacity?



*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 238.05 (3), Florida Statutes, 1941, as amended by Chapter 21971 and 22062, Acts of 1943, provides that membership of any person in the Retirement System shall cease if he shall be continuously unemployed as a teacher for a period of more than two years. There are certain exceptions having no relation to this case.

Section 238.06 (5), Florida Statutes, 1941, as amended by Chapter 22062, Acts of 1943, referring to service certificates issued to teachers, provides:

"When membership ceases such certificate shall become void; should the teacher again become a member, such teacher shall enter the system as a teacher not entitled to prior service credit, except as provided in paragraph (c) of subsection (5) of §238.07, Florida Statutes, 1941."

Paragraph (c) of Subsection (5) of Section 238.07, referred to in the above quoted statute, relates exclusively to reemployment of teachers who had retired under disability allowance and has no bearing on this case.

It is quite clear from these sections of the statutes, that having been continuously unemployed as a teacher for more than two years, the teacher is not entitled to any prior service credit upon reentering service and there is nothing in the statutes authorizing the Board of Trustees to make an exception.

It is my opinion that the teacher's request must be declined.

December 21, 1944.—044-353.

#### SERVICE CREDIT—NYA EMPLOYMENT

**QUESTION:** Is a former County Superintendent, who is a member of the Retirement System, but who, during the calendar years 1941, 1942 and until March 15, 1943, was employed by the National Youth Administration and during such period was paid exclusively by Federal Funds, and who, on March 15, 1943, again came into the County School System of the State, entitled to membership service credit for the period during which he was employed by the NYA, if he contributed to the Retirement System during that time?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

Your letter states that while employed by the NYA, he handled affairs of students in the public school system that came under the jurisdiction of the NYA.

To be entitled to membership service credit, the statute requires that a person be a teacher for the period over which he claims membership service credit. Section 238.01 (4), Florida Statutes, 1941, defines "teacher", as the term is used in the Teachers' Retirement System, as "any member of the teaching or professional staff of any public free school"—or of other named Florida Educational Institutions. Service with the NYA does not come within that definition and it is, therefore, my opinion that the applicant is not entitled to membership service credit for the period during which he was employed by the NYA.

December 21, 1944.—044-354.

#### SERVICE CREDIT—SUBSTITUTE TEACHER

**QUESTION:** Is a member of the Retirement System entitled to receive credit for substitute work rendered prior to July 1, 1939, when the regularly employed teacher is given credit for the same period of service?

*To Honorable Bryan Willis, Actuary, Teachers' Retirement System:*

Several kinds of teacher absences are set up in the statutes, some with pay and some without. Section 238.06 (2), Florida Statutes, 1941, as amended, authorizes the Board of Trustees to fix and determine by rules and regulations how much service in a year is equivalent to a year of service, but limits the amount of credit allowable for absence without pay.

Section 238.06 prescribes the rules under which prior service credit, that is, credit for service rendered prior to July 1, 1939, is allowable to a teacher.

Section 238.01 (4) defines a teacher as a "member of the teaching or professional staff in a public free school," etc. It makes no distinction between a teacher regularly employed and a substitute teacher. All that is required is that he be a member of the teaching or professional staff of the public schools or other institutions mentioned in the section. The fact that the regular teacher was allowed service credit for the same period under the regulations of the Trustees and within the statutory limitations in no manner affects the right of the substitute teacher for service credit for the same period if the latter is otherwise entitled to such credit, and regardless of whether it was before or after July 1, 1939.

April 26, 1944.—044-136.

SERVICE CREDIT—TEACHING IN FOREIGN COUNTRIES

QUESTION: Is teaching in a foreign country creditable as prior service under provisions of the Florida Teachers' Retirement Act, Section 238.06, Florida Statutes, 1941, as amended?

*To Honorable S. C. Bigham, Auditor, Teachers' Retirement System:*

Section 238.06, Florida Statutes, 1941, was amended by Section 3 of Chapter 22062, Laws of Florida, 1943. Such section as amended provides that teachers, upon becoming members of the system, shall file certain information with the Trustees and shall itemize:

"All service as a teacher rendered prior to the date of establishment of the retirement system, including service in a similar capacity in other states rendered by him prior to the first day of July, 1930, for which he claims credit . . ."

and in Subparagraph (3) provides, relative to duties of the Trustees in issuing a "prior service certificate":

"Such prior service credit shall include credit for service, rendered prior to date of establishment, as a teacher within the State of Florida or in a similar capacity outside the State, but not more than 10 years of credit for service outside the State shall be included." (Emphasis supplied).

The above two quoted sections are controlling in connection with this inquiry and determination lies with the construction of the word "State" as used in this section.

On examination it is evident that in the first quoted paragraph, service in the State of Florida was to be itemized and then service in other states itemized. The Trustees in issuing the certificate were to include service:

1. In the State of Florida;
2. Outside the State.

In applying the familiar rule of ejusdem generis where a general word follows words of specific meaning, such general word is not to be construed in its widest extent, but is to be held as applying only to things in the class specifically mentioned. Therefore, in the use of the word

"State" following the words "State of Florida" it is plainly apparent that such word refers to a particular territory within the boundaries of the United States. To the same effect see *People v. Block*, 54 Pa. 385; *Boissevain v. Boissevain*, 231 NYS 529.

It is my opinion that teaching service in a foreign country is not creditable as prior service under the provisions of the Florida Teachers' Retirement Act under Section 238.06, Florida Statutes, 1941, as amended.

March 11, 1944.—044-76.

#### TEACHER—CANDIDATE FOR COUNTY BOARD

QUESTION: 1. May a person, retired on account of age under the Teachers' Retirement System as provided by Chapter 238, Florida Statutes, 1941, as amended, be a candidate for, and, if selected, serve as, a member of a County Board of Public Instruction?

2. Will such person, if elected, lose the benefit of such pension?

*To Honorable S. C. Bigham, Auditor, Teachers' Retirement System:*

Section 230.04, Florida Statutes, 1941, sets out the specific qualifications of members of such Boards as:

"The members of the County Board shall be qualified electors of the county in which they serve, shall be persons of good moral character, of good standing in their respective communities, and shall be known for their integrity, business ability, public spirit, and interest in the promotion of public education."

Such qualifications include no prohibition to a person to become a candidate and serve as a member of a County Board of Public Instruction because of retirement under Chapter 238, Florida Statutes, 1941. On retirement for age a teacher is entitled to benefits as provided by the Act without regard to future occupation, provided that such retired teacher does not become a member of such Retirement System.

A member of the Retirement System is defined in Section 238.01 (4), Florida Statutes, 1941, as amended by Section 1 (4), Chapter 22062, Laws of Florida, 1943, as:

"Teacher shall mean any member of the teaching or professional staff of any public free school, or any county school system, vocational school, the Florida Industrial School for Boys and the Florida Industrial School for Girls, and the Florida School for the Deaf and Blind, the University of Florida, the Florida State College for Women, the Florida Agricultural and Mechanical College, the State Department of Education . . ." (and other provisions not pertinent here).

A member of the County Board is not a "member of the teaching or professional staff" and therefore is not eligible to membership in the Teachers' Retirement System.

It is my opinion that a person receiving benefits for age under Chapter 238, Florida Statutes, 1941, as amended, is not ineligible for that reason to become a candidate and if elected to serve as a member of a County Board of Public Instruction and that service on such board will not result in loss of benefits by such retired teacher.

I have made no examination of special or local laws which may be applicable.

**BOARD OF CONTROL**

March 30, 1944.—044-106.

**APPROPRIATION—A. & M. COLLEGE FOR NEGROES**

**QUESTION:** May the appropriation made by the Legislature to assist in commencing graduate work at the Florida Agricultural and Mechanical College be used without the contribution from the General Education Board?

*To Honorable J. T. Diamond, Secretary, Board of Control:*

This appropriation reads as follows:

"e. SPECIAL. There is hereby appropriated the additional sum of \$1,000.00 per Annum for the next two years to assist in commencing graduate work at the Florida Agricultural and Mechanical College, provided the General Education Board contributed the sum of \$6,500.00 per annum for the next two years for aiding in this work."

It appears that the appropriation referred to is subject to a condition or proviso that the General Education Board contribute the sum of \$6,500.00 per annum for the next two years for aiding in this work.

It is my opinion that no part of the appropriation may be used until the General Education Board contributes the \$6,500.00 as specified in the appropriation bill (pages 846-847, Acts of 1943, Laws of Florida.)

August 28, 1943.—043-227.

**CONTRACTS WITH STATE BOARD OF PHARMACY—VALIDITY**

**QUESTION:** Is the contract between the Florida State Board of Pharmacy and the Board of Control for the purpose of establishing and maintaining a Bureau of Professional Relations, with funds provided by said Board of Pharmacy, within the authority of the Board of Control?

*To Honorable J. T. Diamond, Secretary, Board of Control:*

The funds provided by the Board of Pharmacy and actually used for the purposes specified are in the nature of a donation which your Board under Section 240.11, Florida Statutes, 1941, is authorized to receive.

It is my opinion that said contract is within the authority of your Board.

November 14, 1944.—044-321.

**PAYMENTS FROM PERMANENT BUILDING FUND**

**QUESTION:** May the Comptroller lawfully pay vouchers against the Permanent Building Fund established for use of the four institutions under the management of the Board of Control, issued for repairing certain buildings of the institutions, since the repeal of the acts establishing the Fund?

*To the State Board of Control:*

In your letter of November 6, you give the origin of this fund as Chapter 14573, Acts of 1929. The history of the fund is actually somewhat different.

Chapter 12012, Acts of 1927, provided an additional 1c per gallon gas tax for a period of two years and appropriated one-third of that additional tax to the Permanent Building Fund. The same chapter appropriated to that Fund one-third of all interest collected on deposits of



State Funds in various banks. In 1929 the Legislature enacted Chapter 14573, continuing the additional tax of 1c per gallon on gas, and appropriated therefrom \$400,000 per year to the Permanent Building Fund. Chapter 14573 was repealed by Section 18, Chapter 15659, Acts of 1931, thus eliminating any further revenue from the additional 1c per gallon gas tax, but leaving the one-third of interest collected as provided in Chapter 12012. Chapter 12012 was repealed by being omitted from the Revision of the Statutes of 1941. At the present time the University of Florida has a balance in this fund of \$106.96, the Florida State College for Women has a balance of \$4,112.28, and the Florida School for the Deaf and the Blind has a balance of \$1,855.38.

Neither Chapter 12012 nor Chapter 14573 contains a reverter clause, nor do they fix or limit a time within which the money appropriated should be expended. The General Appropriation Acts of 1927 and 1929 contain no provision applicable to these funds, whereby they would revert at the end of the biennium. I find no constitutional provision or general statute for the reversion of funds other than Section 282.05, which section is applicable only to the appropriations made in 1941 and which also by its terms excludes funds appropriated for the use of the Board of Control.

The absence of any specific limitation in those chapters on the time within which the money appropriated might be expended, and finding nothing in the Acts which could be construed as such limitation, it is my opinion that the repeal of the two chapters did not prohibit the expenditure of the money in that fund after the repeals, and that the Comptroller may lawfully issue vouchers against the funds now on hand for the purposes mentioned.

December 11, 1944.—044-348.

#### REPEAL OF APPROPRIATION—UNIVERSITY OF FLORIDA

**QUESTION:** Was the appropriation of \$50,000.00 made by Section 2, Chapter 18404, Acts of 1937, for the use and benefit of the University of Florida, and for the purchase of necessary furnishings, furniture and equipment for the John F. Seagle Building, repealed by the adoption of the Florida Statutes, 1941?

*To Honorable J. M. Lee, State Comptroller:*

Although Sections 2, Chapters 20719, and 22000, Acts of 1941 and 1943 (Section 16.20, Florida Statutes, 1941) are an express repeal of every statute of this state of a general and permanent nature, not included or recognized and continued in force, in the Florida Statutes, 1941, Sections 3 of the said chapters further provide that statutes, (1) concerning or operative in only a portion of the State, (2) making a grant to a designated individual corporation, and (3) which are local or special in their nature, are not to be held repealed by said Sections 2. (Section 16.21, Florida Statutes, 1941).

The appropriation in question was not made directly to any designated state agency, officer or other person, but was made for the purpose of furnishing and equipping a building belonging to the State Board of Education, under the supervision and control of the State Board of Control. (Sections 240.04, 240.10 and 240.11, Florida Statutes, 1941). The appropriation was to be administered by the Board of Control, and was, in legal effect, an appropriation to the Board of Control.

The State Board of Control (Section 240.01, Florida Statutes, 1941) and the State Board of Education (Section 3, Article XII, Florida Constitution) are legal corporations. The appropriation was, therefore, a grant to a corporation.

The appropriation was for the purpose of furnishing and equipping a certain building in the City of Gainesville, Florida, belonging to an agency of the State. It was likewise a statute making disposition of State Funds. It was a statute providing for the exercise of state powers and functions, although more or less local or special in its operation (*State v. Stoutamire*, 131 Fla. 698, 705, 179 So. 730, 733). In other words, it was a statute local or special in its nature, although not legally to be classified as local or special. Sections 3, Chapters 20719 and 22000, Acts of 1941 and 1943, recognize statutes that are local or special in fact and statutes that are local or special in their nature although not local or special in fact.

From the above and foregoing, I am of the opinion that Section 2, Chapter 18404, Acts of 1937, was both a statute making a grant to a designated individual corporation and a statute local or special in its nature, and therefore within the exemption from repeal contained in Sections 3, Chapters 20719 and 22000, Acts of 1941 and 1943, adopting the Florida Statutes, 1941, and was not repealed by the adoption or readoption of the Florida Statutes, 1941.

### INSTITUTIONS OF HIGHER LEARNING

September 20, 1944.—044-277.

#### SCHOLARSHIPS—FLORIDA STATE COLLEGE

**QUESTION:** May a young woman who wishes to teach home economics in the public schools enter the School of Home Economics at Florida State College for Women instead of the School of Education?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 239.19, Florida Statutes, 1941, establishes scholarships at the University and at the Florida State College for Women, usually referred to as Senatorial State Scholarships and County Scholarships. The requirements are not the same for the two kinds of scholarships. What is said herein is limited to the so-called County Scholarships.

The statute sets up certain requirements and refers to them as "essential requisites." Among these essential requisites for scholarships at the Florida State College for Women is registration in its School of Education.

It is quite clear from the above section and other statutes on the subject that the purpose of the Legislature was to train teachers for the public schools. To that end the statute makes registration in the School of Education an essential requisite and it may not be disregarded.

The statutes do not set up or establish the courses of study or the curriculum in the School of Education. It may be that certain courses in said School are not essential in the training of a teacher, and if so, the holder of the scholarship might be permitted to substitute courses in other schools, e.g. home economics, for such nonessential courses in the School of Education and take only those courses in the latter which the College regards as basic or essential in teacher training. Having registered in the School of Education, I think such substitution might be permitted without violating the statutes if there is a fair and honest compliance with the ultimate intent and purpose of the Legislature, that is, the training of teachers.

## CHAPTER XIII

### MILITARY CODE AND RELATED MATTERS

#### FLORIDA STATE DEFENSE COUNCIL

June 7, 1943.—043-139.

#### AUXILIARY FIREMEN

QUESTION: 1. Are auxiliary firemen who ride with the regular fire fighting personnel on municipally owned apparatus covered under the OCD compensation should they be injured on such apparatus while en route to or from an accidental fire?

2. If covered by the OCD compensation as aforesaid, or if not so covered, would the municipality or the driver of the apparatus be liable?

3. If an auxiliary fireman should be injured or killed in the performance of his duties or in training and such injury or death may be due to the negligence of a paid fireman, can the municipality have assurance that the Federal Government will not enter suit against it to recover compensation or benefits paid to the OCD worker?

4. Where an auxiliary fireman is injured or killed under the circumstances set out in the third question above stated, would the municipality or the paid fireman be liable in a suit filed by the auxiliary?

5. Where a duly enrolled auxiliary fireman driving a government-loaned apparatus runs into and severely injures a civilian, would such auxiliary fireman be liable in damages to the person injured?

6. Where a municipality mounts fire fighting equipment on vehicles loaned to it by third persons for the duration, are such vehicles, to which the municipality does not take title, entitled to an "X" license tag?

7. Where injuries are caused by the operation of the vehicles mentioned in the sixth question, are the owners of such vehicles liable for accidents?

8. Assuming that federal trailer units loaned to municipalities do not require motor vehicle licenses, could this rule be made to apply also to vehicles on which front mount pumps or skid pumps are affixed?

9. Is it possible to enact valid legislation exempting from license all vehicles on which government loaned fire fighting apparatus is mounted?

10. What amounts are paid to auxiliaries in the event of injury or death?

11. When will complete information on the compensation to be paid to injured auxiliaries, or to their representatives for death, be made available?

*To the State Defense Council of Florida:*

Many of the above questions seem to call for information which should be furnished by the regional office of civilian defense instead of by this office; especially, those relating to compensation to be paid by the Federal Government for injuries sustained in the line of duty as members of the Citizens' Defense Corps. Many of such questions cannot be answered by this office with any certainty, as they relate entirely to federal questions. Questions of this nature should be propounded to the federal authorities and will not be answered in this opinion.

1. The question whether auxiliary firemen, who ride with the regular fire fighting personnel on municipally owned apparatus, are covered by OCD compensation is a federal question and should be propounded to the regional office of civilian defense for opinion. The first question will not be answered in this opinion.

2. In answering this question we will assume that a blackout or other similar order has been given by military or police authority and that an auxiliary fireman or other member of the personnel was injured during such emergency. The fact that a blackout or other similar war order has been issued by military or police authority, so that drivers of vehicles who use the streets and roads during such blackout or other emergency must do so under difficulties, does not absolve the driver of such a vehicle from the duties the common law imposed upon him (taking into consideration, however, the difficulties imposed by such blackouts and other emergency measures), to see that other persons using the street or highway are not unduly inconvenienced or exposed to injury because of negligence or carelessness on the part of such driver. The same rule of care as applied to the driver of a vehicle during a blackout or other war emergency will likewise be applicable to other persons during such emergency. No person is relieved of the consequence of his negligence merely because of the existence of a blackout or other war emergency. However, the stress of the emergency should doubtless be taken into consideration when determining whether or not there has been negligence. Persons should use as high a degree of care as is reasonably possible under the circumstances and failure to use such care will render them liable for injuries caused by this negligence. The fact that a blackout or similar emergency existed will not excuse negligence, although it should be taken into consideration when determining whether or not there was negligence. Each case must stand upon its facts in determining negligence. (In this connection see English case and annotations in 136 A.L.R. 317). Answering the second question, it would seem that the circumstances in each case would determine whether or not the municipality or the driver of the apparatus was liable for negligence.

3. Only the Federal Government is able to give a municipality the assurance asked for in the third question. The third question will not be answered in this opinion.

4. Where an auxiliary fireman is injured or killed under the circumstances set out in the third question, the liability of the municipality or paid fireman would depend upon the circumstances of the case under the rule discussed under the second question hereof.

5. Where a duly enrolled auxiliary fireman driving a government-loaned apparatus runs into and severely injures a civilian, the mere fact that the apparatus was government-owned would not absolve the driver from liability for his negligence. His liability would depend upon the circumstances of the case under the rule discussed under the second question hereof.

6. Motor vehicles, trailers and semi-trailers owned and operated by the Federal Government, the State and its political subdivisions are exempted from the motor vehicle license laws of this state (Section 320.10, Florida Statutes, 1941). The requirement of the statute for exemption is that the vehicle be both owned and operated by the State or its subdivisions. The vehicles mentioned in the sixth question, although municipally operated, are not municipally owned. For the reasons stated I do not think that the vehicles described in the sixth question are entitled to an "X" license tag.

7. Where injuries are caused by the operation of one of the motor vehicles mentioned in the sixth question, whether or not the owners of such vehicle were liable in damages for injuries caused by its operation, would seem to depend upon the circumstances of each case. Although I



do not think that the owner would be liable where his vehicle has been loaned to the municipality and is operated by such municipality without any control of the owner and as an instrument of municipal business, it is impossible to reach any definite conclusion upon this question from the Florida authorities; and further, motor vehicles are treated as dangerous instrumentalities in this State. The rule mentioned in the answer to the second question would be applicable to the liability of the driver of any such vehicle.

8. Assuming that federal-owned trailer units loaned to municipalities do not require motor vehicle licenses, no such rule may be applied to a motor vehicle not owned by the government merely because the government-owned trailer or some government-owned front mount pumps or skid pumps are attached to such vehicle.

9. Classification of vehicles on which government-owned fire fighting apparatus is mounted and exempting such vehicles from the payment of a license tax would seem to be a valid classification and such acts would doubtless be valid.

10. What amounts are to be paid to auxiliaries (by the Federal Government) in the event of injury or death, is purely a federal question and should be answered by the regional office of civilian defense instead of this office. This question will not be answered in this opinion.

11. When complete information on the compensation to be paid to injured auxiliaries, or to their representatives, for death, will be made available is a question that can only be answered by the Federal Government, if at all. Such payments will be made by the Federal Government and not the State. This question will not be answered in this opinion.

There was a further question which stated that some local retirement acts for firemen have clauses or provisions which restrict the activities of their firemen, as far as mutual aid to other municipalities and localities is concerned, and requested information as to any legislation at the 1943 session of the Legislature which may have removed this restriction. This question cannot be definitely answered until all the local and general acts are indexed and published, as no one could locate such acts with any degree of certainty at this time.

August 24, 1943.—043-213.

#### MAINTENANCE OF AIR RAID SIRENS

QUESTION: 1. Is it the responsibility of each municipality to furnish its own air raid sirens?

2. Is it the responsibility of the municipality to maintain said sirens in working order?

3. Should a bombing result in the destruction of sirens, is it the responsibility of the municipality to repair and replace them?

4. Is it the responsibility of the County Defense Council to purchase and install sirens for the separate municipalities in the county?

5. If it is the responsibility of the County Defense Council to install said sirens and maintain them, has the Board of County Commissioners the authority to appropriate funds for that purpose?

6. If it is the responsibility of the Defense Council to install and maintain sirens and if the Board of County Commissioners has the authority to appropriate such funds for said purpose, is it the duty of the Board of County Commissioners to make such an appropriation when requested to do so by the Executive Committee of the Council?

*To Honorable Albert H. Blanding, Coordinating Director, Action Divisions,  
State Defense Council:*

As to questions 1, 2 and 3, I find no general law mandatorily making it the legal responsibility of cities and towns to provide, maintain and replace air raid sirens. That they have the undoubted permissive power under their general charter powers to undertake these functions and expend municipal funds for such purposes in order to protect the life and property of their citizens in a time of war, appears to be beyond question.

As to questions 4, 5 and 6, I find nothing in Chapter 249, Florida Statutes, 1941, creating the Florida State Defense Council and County Defense Councils and prescribing their powers and duties, which mandatorily makes it the duty of the County Defense Council to provide and maintain air raid sirens for the cities and towns in the county, or which makes it mandatory for the County Defense Council to require the Board of County Commissioners to appropriate the necessary funds for such purposes. However, Chapter 249 impliedly but unmistakably confers authority upon the County Defense Council to request the County Commissioners to appropriate the funds necessary to pay the expense of installing and maintaining such air raid sirens as the Council may deem necessary for the protection of the life and property of the people of the county, and particularly those residing in the cities and towns therein; and Section 249.10, Florida Statutes, 1941, authorizes the County Commissioners to appropriate the necessary funds to pay such expenses. The county's ability to make the appropriation would be subject to the limitations stated in my opinion of May 28, 1942, to Honorable George L. Burr, Jr., Executive Director, Florida State Defense Council.

A similar request could be made by the State or County Defense Council to a city to provide necessary sirens for the protection of the city, and it would not be illegal for the city to authorize payment for same out of available city funds.

Although the statutes do not expressly require the County Defense Council, the county, or the city to install, maintain and repair air raid sirens, it is my opinion that, in an extreme case, where the necessity for air raid sirens is evident, and funds for same cannot otherwise be obtained, an order from the State or the County Defense Council to a county or city, or both, to provide the funds for same, would be mandatory and could be enforced by appropriate legal proceedings. This is so because Section 249.04, Florida Statutes, 1941, enumerating the powers of the Florida State Defense Council contains the following:

"(7) To require and direct the cooperation and assistance of state and local governmental agencies and officials.

\* \* \*

"(9) To do all acts and things, not inconsistent with law, for the furtherance of defense activities." (Emphasis supplied).  
Section 249.06, Florida Statutes, 1941, provides in part:

"Insofar as applicable, county councils shall have the same power and duties, within their jurisdiction, as are vested in the (state) council."

Chapter 249 does not contemplate that there shall be a complete failure on the part of public officials to provide necessary public defense facilities in time of war, because of jurisdictional doubts as to the responsibility of particular officials to act. By creating the State and County Defense Councils the Legislature provided the coordinating agencies to have supervision of public defense matters and gave them the power to make decisions in such matters and the power to require and direct assistance from other public officials in carrying out such decisions.

including the supplying of necessary public defense facilities. Requirements of the Defense Councils, unless palpably arbitrary, capricious and unreasonable and unless foreign to the needs and interests of particular localities, are mandatory and the particular officials directed to comply therewith may be compelled to do so.

Many considerations naturally would be involved in the advisability and necessity for such a mandatory order, some of which are: the absolute necessity for the sirens; whether existing facilities, if any, were sufficient; the financial ability of the county or city to provide and maintain such sirens, impossibility of securing federal assistance for such purpose, and the reasonableness of such an order under the circumstances obtaining. The order should certify the facts showing the necessity for requiring assistance from the county or city, or both.

This opinion, of course, is concerned only with the legal phases of the questions submitted, and in nowise intends to suggest that any requirements be ordered in lieu of full efforts to attain harmonious cooperation between the various groups involved to secure such air raid sirens as may be required.

## CHAPTER XIV

### PUBLIC LANDS AND PROPERTY

#### INTERNAL IMPROVEMENT FUND

August 6, 1943.—043-184.

##### EXCHANGES—OIL AND MINERAL RIGHTS

**QUESTION:** Where the Trustees of the Internal Improvement Fund exchange lands held by them for lands owned by individuals, pursuant to Section 253.42, Florida Statutes, 1941, may such exchanges be made without reserving mineral and oil rights as required by Section 270.11, Florida Statutes, 1941?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Under Section 270.11, Florida Statutes, 1941, reservation of an undivided one-half interest to petroleum in the land sold by both the Trustees of the Internal Improvement Fund and the State Board of Education is required in all contracts for sale and in all deeds for the sale of lands of the State executed by the Trustees or the State Board.

However, Section 253.42 provides that the Trustees of the Internal Improvement Fund may **exchange** lands held by them for lands owned by private individuals upon such terms and conditions as may be agreed upon.

In view of this latter section I am inclined to the belief that an exchange of lands is not a sale and no condition requiring reservation of oil, mineral or petroleum rights in the State prevails for such a transaction. However, the transaction must be a legitimate and pure exchange in order for it to be free of these reservation rights. The legal definition for exchange as distinguished from sale which I accept as correct is as follows: Where property is transferred for property—no price being set on either piece, the transaction is an exchange, although in these cases one of the parties may pay a sum of money in addition to the property.

August 2, 1943.—043-190.

##### FILLED-IN LANDS—OWNERSHIP

**QUESTION:** Are Trustees of the Internal Improvement Fund vested with title with power of sale to lands formerly in the bed of Biscayne Bay lying between high and low water marks and now filled in by the upland owner?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

It is my opinion that the purchaser of Government Lot 2 from the Trustees, by deed recorded in Deed Book 165, page 177 of the Public Records of Dade County, obtained no title to that part of Biscayne Bay lying below the actual high water mark, as the Trustees of the Internal Improvement Fund had no authority at the time the deed was issued to convey "Sovereignty Lands." The right to sell "Sovereignty Lands" arises by virtue of Chapter 7304, Laws of Florida, Acts of 1917, Chapter 1061 R. G. S., Section 253.12, Florida Statutes, 1941, and certain other Acts relating to Dade, Monroe and Palm Beach Counties passed about the same time as Chapter 1061.



If, on the other hand, the government survey was correct and title to lands now filled in had passed to the purchaser under the deed, title has since reinvested in the State, because of the general principle that lands lost by erosion become property of the State where the claim for the property is only because of the claim of an upland owner. See *New Orleans vs. United States*, 10 Peters 622, 9 L. Ed. 661, holding that every riparian proprietor is: "Subject to loss of his interest by the same means which may add to his territory." You may therefore assume that lands lying to the bay or water side of the high water mark belong to the State of Florida as Sovereignty Lands.

It may be contended that under the Butler Act, Chapter 8537, Acts of 1921, now Section 271.01, Florida Statutes, 1941, the owner of the upland would be entitled to filled-in or "made lands" in front of his property on Biscayne Bay.

Prior to the enactment of Chapter 8537, riparian owners had only the statutory right granted them under the Riparian Rights Act of 1856. (See *Thieson vs. Gulf F. & A. Railway Co.*, 75 Fla. 28, 78 So. 491.) The Act of 1856 applied only to owners of land whose title extended to the low water mark. Title to lands in Florida generally extends to the high water mark.

Although the general language in the first section of Chapter 8537, Acts of 1921 (Butler Act), might lead one to believe that there was intended a grant by the State, of title to lands in navigable waters, when filled-in as provided therein, the remaining sections of the Act read with the first section, make it exceedingly plain that the only effect of such Act was to extend statutory riparian rights to "lands, the title to which extended to the high water mark," and the only effect of such Act was to cure the defect in the prior Act of 1856.

Section 9 of the Butler Act reads as follows:

"Nothing in this Act contained shall affect or repeal Sections 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064 of the Revised General Statutes of Florida."

Sections 1061 and 1062 not only give the Trustees of the Internal Improvement Fund authority to sell submerged lands, but also vests title therein in said Trustees. One of the types of land mentioned in 1061 is "sand bars and shallow banks along the shores of the mainland." This language has been construed to mean shallow waters along the high water mark in navigable waters. See *Caples vs. Taliaferro*, 144 Fla. 1, 197 So. 861.

The Courts of the State continue to recognize the rights of the Trustees and the State of Florida under Sections 1061 and 1062 governing sales since the enactment of Chapter 8537. See *Islands, Inc. vs. Carlton, et al.*, 141 So. 896. It is plain that the Legislature intended that "Sovereignty Lands" should remain vested in the Trustees with right of sale. This is further borne out that in the 1941 Statutes which have been adopted by the Legislature as a "Revision" of the Florida Law, the "Butler Act" is combined with the Riparian Act of 1856 (Chapter 791), and all the Acts excepted under the provisions of Section 9 of the "Butler Act" have been re-enacted.

It is therefore my opinion that the so-called Butler Act is effective only to cure the defect in the Act of 1856, to provide statutory riparian rights to owners of lands whose title extends to the high water mark, and that the upland owners acquire no additional right or title by filling-in lands between the high water mark and the channel, and must obtain title from the Trustees of the Internal Improvement Fund by purchase.

March 27, 1944.—044-99.

#### LANDS VESTED IN THE STATE THROUGH ERROR

**QUESTION:** Where lands have become vested in the Trustees of the Internal Improvement Fund through an erroneous Sheriff's deed, may the Trustees reconvey said lands for the purpose of clearing the title?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

Section 253.03, Florida Statutes, 1941, places supervision, control, etc. of "all lands which have accrued or which may hereafter accrue to the State . . ." in the Trustees of the Internal Improvement Fund. This section, however, does not empower such Trustees to sell lands so vested. I know of no other section that would affect the lands described.

It is therefore my opinion that lands vested in the Trustees under Section 253.03, Florida Statutes, 1941, may not be sold or conveyed in the absence of specific power of sale granted by the Legislature.

January 21, 1944.—044-27.

#### LEASE TO UNITED STATES

**QUESTION:** 1. What is the effect of the release from liability of the United States by the Trustees of the Internal Improvement Fund (C. R. Form 129)?

2. May the Trustees authorize such releases generally without specific release being authorized?

*To Honorable F. C. Elliot, Secretary, Trustees of the Internal Improvement Fund:*

This inquiry is directed to those leases of Murphy lands leased to the United States under U. S. Standard Form No. 2, modified to fit the State of Florida, the consideration of such lease being the nominal sum of one dollar and the term from year to year, but not to exceed a term of six months beyond the end of the present national emergency. The lease contains an option of the United States to renew from year to year on thirty days' written notice given to the Trustees. Section 9 of the lease reads as follows:

"9. It is agreed that the Government shall not be responsible for any damage to said premises that may arise incident to the use thereof for the purpose for which leased, and the government shall not be required by the Trustees to restore the premises under the terms of this lease."

The purposes of the lease are generally recited as:

"The requirements of the War Department."

The lands leased by the Trustees are wild, vacant and unoccupied, and the only damage that could be occasioned by the use would be the destruction of timber and undergrowth. This loss was apparently waived by the above Section 9.

The release form discharges the United States and its officers and agents from all manner of actions and claims arising out of said lease and occupation by the United States of the property. It is difficult to anticipate a claim of the Trustees that is not already within the provisions of Section 9 of the lease.

It is therefore my opinion that the Trustees are waiving no substantial right by the execution of such release form.

With reference to a "blanket" authorization to execute such leases, in view of the fact that the leases are uniform and releases are uniform, it is my opinion that the acceptance by the Trustees of the terms and con-

ditions of one of the forms of releases with the instruction that such releases be authorized as to other like parcels where the same facts and conditions exist, is sufficient. In instances where some special damages are brought to the attention of the Secretary with reference to some particular tract, the facts should be considered by the Trustees before execution of the release.

October 19, 1943.—043-298.

#### MINERAL AND PETROLEUM RESERVATIONS—SALE; RELEASE

**QUESTION:** Do Trustees of the Internal Improvement Fund have authority to sell or release undivided interests of the State in minerals and petroleum reserved by Section 270.11, Florida Statutes, 1941?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Section 270.11, Florida Statutes, 1941, originally enacted as Chapter 6195, Acts of 1911, provides that in all contracts and deeds for sale of land by the Trustees of the Internal Improvement Fund and State Board of Education there shall be reserved for the Trustees of the Internal Improvement Fund and their successors, and the State Board of Education and its successors, an undivided three-fourths interest in all the phosphate minerals and metals in, on or under the described lands; and an undivided one-half interest in all the petroleum in, on or under said described lands, with the privilege to mine and develop the same.

Chapter 9289, Acts of 1923 (1436 C. G. L.), authorized the Trustees of the Internal Improvement Fund to sell or lease, for oil, gas or minerals, any interest in lands held by the State; and further provided that "Notice and a preferential right shall be given to the owners of lands wherein the Trustees of the Internal Improvement Fund shall sell or lease their reserved rights." This provision was not included in Florida Statutes, 1941; and under Section 16.20 it was repealed as of the effective date of said Florida Statutes.

Section 253.45 authorizes the Trustees of the Internal Improvement Fund to sell or lease the minerals in, on or under any of the sovereignty lands of the State.

Section 253.47, Florida Statutes, authorizes the Trustees of the Internal Improvement Fund to lease for royalties, sell, or otherwise dispose of the rights to drill wells for the production of petroleum and natural gas in the bottoms of sovereignty lands.

Section 270.28 authorizes the Trustees of the Internal Improvement Fund and other boards therein named to enter into and execute oil and/or gas or other mineral leases.

Except as provided for in said Sections 253.45, 253.47 and 270.28, Florida Statutes, I find no authority for, and it is my opinion that the Trustees of the Internal Improvement Fund do not have, authority to sell or lease the statutory oil and mineral reservations, which, by Section 270.11, Florida Statutes, are required to be contained in all contracts and deeds for sale of lands by the Trustees of the Internal Improvement Fund.

However, it is my further opinion that sale of "lands" as used in Section 270.11 refers only to public lands, such as sovereign lands, Internal Improvement Fund lands, swamp and overflow lands and school lands (see *State ex rel Town of Crescent City v. Holland*, 10 So. 2d 577), as contemplated at the time said statute was enacted; and does not embrace lands title to which vested in the State for the purpose of enforcing the sovereign right of taxation (as *Murphy Act lands*), or for any other purpose not considered as an established public use or purpose. If the Trustees of the Internal Improvement Fund in their discretion make any reservation in deeds on sale of lands not held for a public purpose or use, it is my opinion that said Trustees have the right to sell or release such reservations.

March 9, 1944.—044-82.

#### TAXATION.

**QUESTION:** Are lands purchased from the Trustees of the Internal Improvement Fund in 1943 and conveyed by deed dated in December, 1943, but delivered by the Trustees to the Clerk of the Circuit Court and recorded by him after January 1, 1944, subject to taxation for 1944?

*To Honorable Ernest C. Nott, Tax Assessor, Marion County, Ocala, Florida:*

In reply I wish to advise that I understand that the Clerk of the Court to a certain extent represents not only the Trustees but also the purchaser, and the Trustees have instructed the Clerk that they would not sell land unless the purchaser would put up the recording fees and that they requested the Clerk of the Court to record the deeds. Usually these deeds are prepared some time in advance because each one of the Trustees must sign the same and title does not actually pass to the purchaser under the above set-up until the deed has actually been delivered to the Clerk and if the deed is actually delivered to the Clerk prior to January first, the property should be taxed for the succeeding year, regardless of the fact that the Clerk did not record said deed until after January first, since as I have pointed out, the Clerk is also acting as agent of the purchaser and delivery of the deed to the Clerk is in law delivery to the purchaser. If the deed is not delivered to the Clerk until after January first, then of course the property is not taxable for the current year. It is therefore necessary for you to ascertain the facts in each instance in order to determine if the property is assessable.

#### STATE LIBRARY

September 29, 1944.—044-291.

#### MONEYS RECEIVED—HOW DEPOSITED

**QUESTION:** To which account should moneys be deposited that are received in the form of payments representing restitution by a former employee of the State Library Board of moneys embezzled by such employee during a prior biennial appropriation period?

*To Honorable W. T. Cash, Secretary, State Library Board:*

It is my opinion that payments received under the foregoing circumstances should be deposited to the General Revenue Account, since it does not appear that the provisions of the Appropriations Act for the current biennial period or any other provisions of law authorize the use of such moneys by the Library Board or provide for it to be deposited to any account other than that of general revenue.

#### EVERGLADES NATIONAL PARK

January 24, 1944.—044-33.

#### CONVEYANCE OF LANDS AND JURISDICTION TO THE UNITED STATES

**QUESTION:** 1. Does the Everglades National Park Commission have the power to convey title to lands and exclusive jurisdiction over them to the United States?

2. Do the Trustees of the Internal Improvement Fund have the power to convey the title to lands and exclusive jurisdiction over them to the United States?



*To Mr. C. R. Vinton, Coordinating Superintendent, United States Department of the Interior, National Park Service, St. Augustine, Florida:*

In answer to your first question I invite your attention to Section 264.06, Florida Statutes, 1941, empowering the Everglades National Park Commission to convey title to lands it may acquire in Dade, Monroe and Collier Counties to the United States. The Act specifically provides that the conveyance shall be in the name of the State of Florida by the Governor and attested by the Secretary of State and sealed with the great seal.

Section 264.08, Florida Statutes, 1941, provides a cession by the Legislature of jurisdiction to such lands conveyed pursuant to said Section 264.06. The cession provides:

"... all lands mentioned in 264.04 and for the purposes set out in the act of Congress approved May 30, 1934 (Public No. 267, 73 Congress) and exclusive jurisdiction is deeded to the United States of America over and within all the territory in the State of Florida thus deeded or conveyed; saving however to the State of Florida the right to serve criminal or civil process within the limit of the land or lands thus acquired, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crime committed, in said State outside of said land or lands, and on account of rights acquired, obligations incurred, or crimes committed on or within said lands, prior to the date of the giving or serving of notice, as herein-after provided, of the assumption of police jurisdiction over such land or lands by the United States; and saving further to said state the right to tax sales of gasoline and other motor vehicle fuels and oil for use in motor vehicles, and to tax persons and corporations, their franchises and properties, on land or lands deeded or conveyed as aforesaid; and saving also to persons residing in or on any of the land or lands deeded or conveyed as aforesaid, the right to vote at all elections within the county in which said land or lands are located, upon like terms and conditions and to the same extent as they would be entitled to vote in such county had not such lands been deeded or conveyed as aforesaid to the United States of America; provided nevertheless that such jurisdiction shall not vest in the United States unless and until it, through the proper officer or officers, notifies the Governor and through him the State of Florida, that the United States of America assumes police jurisdiction over the land or lands thus deeded."

This cession is statutory and is limited by the proviso therein and takes effect on the conveyance of lands as provided by said Section 264.06, Florida Statutes, 1941, and the proper acceptance by the United States as provided by Section 264.08, Florida Statutes, 1941.

The purposes set out in the Act of Congress approved May 30, 1934, mentioned in said Section 264.08 are found in Title 16, Conservation #410-410c USCA (48 Statutes 816) and appear to be:

"... said lands shall be and are hereby established, dedicated and set apart as a public park for the benefit and enjoyment of the people and shall be known as the Everglades National Park .... The said area shall be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area."

The United States and the State of Florida may make mutually satisfactory agreements as to their respective jurisdiction over territory. *Collins v. Yosemite Park & Curry Company*, 82 L. Ed. 1502; *Ryan v. Washington*, 82 L. Ed. 187. The state may, by legislative action, qualify its cession by reservations not inconsistent with the governmental uses.

James v. Dravo Contracting Company, 82 L. Ed. 155. There appears to be nothing inconsistent between the uses proposed by the government and the provisions of the statutory cession.

It is my opinion that the Everglades National Park Commission may convey the lands and property in Dade, Monroe and Collier Counties acquired pursuant to Section 264.03, Florida Statutes, 1941, and on such conveyance the United States will acquire the jurisdiction over such lands as granted by said Section 264.08, Florida Statutes, 1941. This jurisdiction is not exclusive but is limited by the proviso whereby the State retains a partial jurisdiction.

In answer to the second question, I beg to advise that pursuant to Chapter 21690, Laws of Florida, Acts of 1943, (Section 264.15, Florida Statutes, 1941), the Trustees of the Internal Improvement Fund are authorized to convey to the United States Murphy lands in Dade, Monroe and Collier Counties.

I also call your attention to Section 192.38, Florida Statutes, 1941, as amended by Chapter 21684, Laws of Florida, Acts of 1943; Subsection (b) of which authorizes the Trustees to convey Murphy lands to the United States on such terms and conditions as they may fix.

I also call your attention to Subsection (b) of said section, as amended, authorizing the Trustees of the Internal Improvement Fund to convey parcels or tracts of Murphy lands to any state agency on such terms and conditions as said Trustees may fix.

It is my opinion that the Trustees of the Internal Improvement Fund may convey Murphy lands to the United States of America pursuant to powers granted under Chapter 21690, Laws of Florida, Acts of 1943, and Subsection (b) of Section 192.38, Florida Statutes, 1941, as amended by Chapter 21684, Laws of Florida, Acts of 1943. Such conveyances will not act as or authorize a cession of jurisdiction, nor do the said Trustees or any other authority have power to grant cession of jurisdiction over the land so conveyed. If the lands are conveyed by the said Trustees to the Everglades National Park Commission under authority granted to the said Trustees by Subsection (c) of said Section 192.38, Florida Statutes, 1941, as amended by Chapter 21684, Laws of Florida, Acts of 1943, then such lands may be conveyed to the United States pursuant to Section 264.06, Florida Statutes, 1941, and such conveyance act as a grant of cession of jurisdiction provided by said Section 264.08, Florida Statutes, 1941.

### MONUMENTS AND MEMORIALS

August 17, 1944.—044-242.

#### WHEN WARRANTS MAY BE ISSUED BY COMPTROLLER

QUESTION: Should the Comptroller issue warrants as requested under the terms and conditions of the contract between a New York sculptor and the State Board of Control for the creation of a bronze statue of a past President of the University of Florida?

*To Honorable J. M. Lee, State Comptroller:*

I have perused the contract and it appears to be sufficient for the accomplishment of the desired purpose, and in view of the partial performance that has already ensued, it is, my opinion that it should be carried out without amendment or alteration.

The bond attached is not a bond for the complete performance of the contract, but a bond for the performance of the contract "through the production of the full size plaster model, as provided for in paragraph 5 of the contract," etc.

Under the terms of the contract, upon the completion of the plaster model the aggregate sum of \$14,000.00 would have been paid in accordance with the terms of payment expressed in the contract.

The amount remaining to be paid for the completion of the bronze statue delivered in place upon the pedestal at Gainesville, Florida, would be \$6,000.00. If for the \$6,000.00 the bronze casting could be procured and placed in position, then it is my opinion that the contract is reasonably secured by the bond; if not, the contract is not reasonably secured.

In the event of a breach of contract after the completion of the plaster model, it would be necessary for the sculptor to perform the remainder of the contract before the \$6,000.00 would be due, but the bond does not extend nor purport to cover that element of the contract.

Chapter 13702 of the Acts of 1929 appropriates \$10,000.00 as a contribution to the erection of this statue and provides that it shall be expended under the direction of the State Board of Control.

It is my opinion that to the limit of this appropriation and such private subscriptions as shall have been added to the amount appropriated, you would be justified in issuing warrants in accordance with the contract.

## PUBLIC LANDS

June 20, 1944.—044-187.

### DEVELOPMENT OF PETROLEUM AND MINERAL INTERESTS—STATE BOARD OF EDUCATION

**QUESTION:** Has the State Board of Education authority to enter into an agreement with a private concern for the development and production of petroleum and mineral interests reserved pursuant to Section 270.11, Florida Statutes, 1941?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Before passing on the particular agreement submitted, I wish to advise that it is my opinion that inasmuch as Section 270.11, Florida Statutes, 1941, confers upon the State Board of Education the privilege of mining and developing its reserved interests in minerals and petroleum, the Board may enter into an agreement with a private concern or individual for the purpose of exploring, prospecting, drilling and mining such reserved interests and such agreement may provide that the private concern or individual be compensated for its or his services, costs and expenses by a percentage of the oil or minerals produced or severed from the soil. It is assumed, of course, that such an agreement will be free from fraud or illegality, that the Board will exercise its powers of agreement reasonably so as not to sacrifice the public interest or bestow a benefit on a private concern or individual incommensurate with the benefit or profit which under sound business customs should be obtained for the State.

The Board has little, if any, means whereby it can mine and develop these reserved interests except through an arrangement of this kind. Moreover, the unreserved interests in petroleum and minerals of private parties as well as the interest of the owner of the soil must be taken into account by the Board in connection with the development of its reserved interests and this can best be done by agreements of this nature.

It is my opinion also that such an agreement is not a sale or lease of the reserved interests of the Board as contemplated by Sections 4 and 5, Article XII of the Florida Constitution, or by Sections 270.07 to 270.09 inclusive, Florida Statutes, 1941, relating to sales of certain public lands or interests therein.

With regard to the particular agreement submitted, I call attention now to what I consider are necessary amendments thereto:

1. The preamble should recite that the Board is acting under its authority to mine and develop the reserved interests involved, pursuant to the authority of Section 270.11, Florida Statutes, 1941, through its agent or instrumentality, the aforementioned private concern.

2. I think that Sections 5, 6, 8, 9 and 10 should be eliminated from the agreement since they are more compatible with a long time renewal lease arrangement than they are with a for hire or employment petroleum and mineral production agreement.

I will rewrite the instrument and submit to the applicant a form which I believe to be appropriate to handle the transaction.

November 23, 1944.—044-327.

#### QUITCLAIM DEED TO PROPERTY RESERVED FOR DRAINAGE PURPOSES

QUESTION: 1. May the Trustees of the Internal Improvement Fund give a quitclaim deed to gravel, stone or earth reserved for canal purposes in a former conveyance by the Trustees of land in the Everglades Drainage District?

2. Does the word "mineral" embrace "coral rock"?

*To Honorable F. E. Bayless, Land Division, Department of Agriculture:*

It is observed that a deed is being sought from the Trustees of the Internal Improvement Fund quitclaiming all gravel, stone and earth which are located on or under certain Dade county land, situated in the Everglades Drainage District, which land the Trustees conveyed in 1919. The said conveyance reserved unto the Trustees (1) the right to enter for the purpose, among others, of constructing canals; (2) the right to take from said lands, and to use, such gravel, stone or earth as may be necessary to use in connection with the construction of said canals; and (3) a strip 130 feet on each side of any canal that may be constructed.

With reference to the second and third above reservations, it has come to my attention that a canal has been constructed through a portion of the property involved herein and, further, that the Trustees on September 28, 1944, conveyed to the Board of Commissioners of the Everglades Drainage District the reservations for canal purposes reserved in the sale of land by the Trustees along or through any land occupied by any drainage works, such as canals, of said District. The Trustees accordingly no longer have any interest in the canal right-of-way through this property, nor in the gravel, stone or earth that was used in the construction of the canal.

A canal having been completed, there would seem to be no need now for the reservations for canal purposes on the remainder of the property and it is my opinion that the Trustees would be authorized, as a part of the consideration of the original deed, to quitclaim such reservations to a holder under the first grantee of the Trustees, excepting from the conveyance the reservations deeded to the Board of Commissioners.

The second question arises because, first, a quit-claim deed is also desired as to so-called coral rock (geologically known as "colite") on and under the land, and, second, in the same conveyance of 1919 the Trustees reserved certain mineral rights in accordance with Section 270.11, Florida Statutes, 1941. However, it has been held in an opinion of this office that the reservations required by such section in deeds from the Trustees do not include coral rock.

There is no need, consequently, for the Trustees to quitclaim this latter material as title to it was not reserved.



## GRANTS TO RIPARIAN OWNERS

March 1, 1944.—044-67.

## OWNERSHIP OF ISLANDS

QUESTION: Who is the owner of a small island in the Caloosahatchee River created by the deposit of "spoil" in the bed of the river?

To Honorable F. E. Bayless, Land Division, Department of Agriculture:

It appears that a resident of Fort Myers claims title to such island by virtue of a deed from the Trustees of the Internal Improvement Fund to a Florida Holding Company, dated July 22, 1926, conveying a rectangular area lying in the bed of such river adjoining lots 11 and 12 of block 2, Frierson & Hendry's Addition to Fort Myers. The island in question lies directly off shore from such lots, and a small area may fall within the area deeded to the Florida Holding Company. An actual survey must be made to make a more accurate determination of this question.

Said resident contends that he owns such island and any filled area contiguous to the land lying in the bed of the river deeded to the Company. His claim is apparently based on Section 271.01, Florida Statutes, 1941.

I have previously rendered you an opinion on August 2, 1943, holding that such section is not to be construed to grant to the "upland owner" the right to fill in land below the high water mark without purchasing such land from the Trustees of the Internal Improvement Fund. Section 271.01, Florida Statutes, 1941, has been construed by me to have the effect only of vesting in the upland owner "riparian rights" and the right to fill as to those owners that hold title to the "high water" mark, thus curing the defect in the 1856 Act which granted riparian rights only to those owners who held title to the "low water" mark.

The title to an island in the bed of a stream unconnected with the shore is in the Trustees of the Internal Improvement Fund. (See Trustees Internal Improvement Fund v. Stark, 25 F. Supplement 731; and Brickell v. Trammell, 82 So. 221).

The fact that the area lying between the island and the upland has been conveyed by the Trustees to the "upland owner" and that the island may be contiguous to such conveyed area would not change such rule.

It is therefore my opinion that title to an island in the bed of a navigable stream created by depositing "spoil" in the bed or banks of the stream is vested in the Trustees of the Internal Improvement Fund.

## CHAPTER XV

### PUBLIC BUSINESS

#### MISCELLANEOUS

October 4, 1943.—043-260.

#### FIRE CONTROL DISTRICT

**QUESTION:** Was Section 4, Chapter 20973, appropriating money out of the General Revenue of the State of Florida, repealed as of June 10, 1943, the effective date of Chapter 22000?

*To Honorable J. M. Lee, State Comptroller:*

I beg leave to state that although Section 4 of Chapter 19274, Laws of Florida, Acts of 1939, as amended by Chapter 20973, Laws of Florida, Acts of 1941, insofar as it makes an appropriation out of the General Revenue Fund for the benefit of the Fire Control District, may be "for the exercise of state powers and functions . . . more or less special in their operation or objects" (State v. Stoutamire, 131 Fla. 698, 179 So. 730, text 733), I do not think that said Section 4 as amended was repealed by Chapter 22000, Laws of Florida, Acts of 1943, because said Section 4 as amended was a law "which are local or special in their nature" within the purview of the last paragraph of Section 3 of said Chapter 22000.

December 11, 1944.—044-345.

#### GOVERNOR—AUTHORITY TO PURCHASE PROPERTY FOR STATE CAPITOL CENTER

**QUESTION:** May the Governor expend contingent funds provided for his use in the General Appropriation Bill of the 1943 Legislature (Item 57, Chapter 22071) to complete the purchase of certain properties in the City of Tallahassee for the use of the State as a part of the proposed State Capitol Center?

*To Honorable Spessard L. Holland, Governor:*

The Legislature, by Chapters 21652 and 21653, Acts of 1943, has already indicated its approval of the project by authorizing purchases of a part of the properties contemplated for the Center by the Trustees of the Internal Improvement Fund and the Florida Industrial Commission.

It is, therefore, my opinion that you may in the exercise of your sound discretion as Governor use part of the contingent funds for the purchase of said property, inasmuch as said State Capitol Center project is a recognized legitimate state purpose, provided that such expenditure is given the approval of the State Budget Commission as a matter of policy. There appear to be no specific legislative directions as to your use of said contingent funds. Therefore, so long as such funds are devoted to a legitimate and worthy state purpose and reasons of sound public policy exist justifying such use, and the expenditure is made in good faith, and the value secured for the State is commensurate with the expenditure, there can hardly be any legal objection to the Governor's exercise of his sound discretion in the use of these funds.

July 24, 1944.—044-217. See: 044-216 & 044-218

### SALARIES—HEADS OF STATE INSTITUTIONS

**QUESTION:** What law governs the salaries of Superintendents and heads of the following State Institutions?

1. State Prison Farm
2. Florida State Hospital
3. Florida Farm Colony
4. Florida Industrial School for Boys
5. Florida Industrial School for Girls.

*To the Board of Commissioners of State Institutions:*

In all but one instance (Florida State Hospital) we have specific statutory provisions fixing the salaries of these Superintendents or heads of said institutions. However, for the reasons set forth below, these must yield to the 1943 Appropriation Bill (Chapter 22071) for the biennium 1943-1944. It has been the custom for some years not to particularize in the Appropriation Bill with respect to salaries but to make blanket salary appropriations for the various departments. In order to ascertain the "breakdown" of these blanket salary appropriations it is necessary to examine the report of the Budget Commission to the Legislature for the 1943 session. With respect to each of the institutions mentioned above, the amount for salaries requested by the institution and the amount recommended by the Budget Commission in its report are identical with the amount appropriated in the Appropriation Bill. Section 8 of the Appropriation Bill provides as follows:

"Where the salary of any officer or employee of the State has not been changed by any act out of the legislature of 1943, the appropriation for salaries respecting such officer or employee shall control the salary or compensation to be paid such officer or employee."

Hence, it seems the amounts set up in the report of the Budget Commission to the 1943 Legislature with respect to salaries for these Superintendents and heads are controlling and the specific statutory provisions with respect to salaries are suspended during the life of the Appropriation Bill. State ex rel Williams v. Lee, 191 So. 696; State ex rel Knott v. Lee, 197 So. 681. The amount for salaries fixed by statute and those set up in the report of the Budget Commission to the 1943 Legislature for the respective institutions embraced herein are as follows:

INSTITUTION	Florida Statutes, 1941 Statutory Salary	Appropriation Bill
State Prison Farm (Superintendent)	Section 954.35 \$3,000.00	\$4,800.00
Florida State Hospital (Superintendent)	Section 394.05 provides that the salary be fixed by the Board of Com- missioners of State Institutions.	
Florida Farm Colony (Superintendent)	Section 393.02 \$3,600.00	\$3,600.00
Industrial School for Boys	Section 955.05 \$3,600.00	\$4,000.00
Industrial School for Girls	Section 956.07 \$2,000.00	\$2,400.00

No mention is here made of certain prerequisites of certain of the Superintendents and heads such as housing, sustenance, etc., in addition to salary.

To make these appropriations for salary effectual, Section 13 of the 1943 Appropriation Bill provides in substance that the appropriations provided herein shall be available to the departments, provided that the head of the department files with the Budget Commission a complete statement of expenditures, etc., on or before July 1st of the fiscal year for which the appropriation is made.

July 24, 1944.—044-216.

#### SALARIES—STATE EMPLOYEES

**QUESTION:** May the Board of Commissioners of State Institutions by resolution increase the salary of a state employee?

*To the Board of Commissioners of State Institutions:*

Section 8 of Chapter 22071, Acts of 1943 (Appropriation Bill), provides as follows:

"Where the salary of any officer or employee of the State has not been changed by any Act out of the Legislature of 1943, the appropriation for salaries respecting such officer or employee shall control the salary or compensation to be paid such officer or employee."

No change in the Superintendent's salary was provided by any 1943 Act and the budget covering such salary under which the 1943 Appropriation Bill was made, made provision for a definite sum, to-wit, \$5,000.00. Any attempt to increase this salary during the 1943-1944 biennium would be unauthorized by law.

#### STATE FIRE INSURANCE FUND

December 9, 1944.—044-342.

#### STATE TREASURER—INSURANCE OF BRIDGES ON STATE HIGHWAYS

**QUESTION:** Are bridges, located on state highways, state property of an insurable nature which should be insured with the State Treasurer in the State Fire Insurance Fund?

*To Honorable J. Edwin Larson, State Treasurer:*

A careful study of the law with respect to the State Fire Insurance Fund (Chapter 284, Florida Statutes, 1941) leads me to the conclusion that bridges on state highways are not state property of an insurable nature and required to be insured with the State Treasurer in the State Fire Insurance Fund, as contemplated by said Chapter 284.

In view of such conclusion, it is my opinion the above question is properly answered in the negative.

#### SEMINOLE INDIAN RESERVATION

February 19, 1944.—044-60.

March 31, 1944.—044-110.

#### LEASING, FENCING AND POSTING LANDS

**QUESTION:** 1. May lands set aside by the State in Broward County as a Seminole Indian Reservation be leased for oil and gas mining purposes?

2. May these lands be leased for grazing to other than the Seminoles?



3. May hunters and trespassers be kept off these lands?
4. May all or any portion of these lands be fenced for pasture use for the benefit of the Seminoles?
5. May the Board of Commissioners of State Institutions authorize an agent to act in exercising authority on behalf of the Seminoles in carrying out the matter comprehended in the last three questions?

*To the Board of Commissioners of State Institutions:*

These lands are held in trust by the Board of Commissioners of State Institutions for the perpetual benefit of the Indians under Chapter 285, Florida Statutes, 1941. Section 270.28, Florida Statutes, 1941, empowers the Board to sell and convey and lease for petroleum and oil "any lands or water bottoms, the legal title of which is vested by law or otherwise in said Board, on such terms and conditions as may be fixed by the Board executing the lease." I find no other provision of law relating to the Board's power to deal with these lands than the one just referred to. I believe this section contains sufficient authority for the Board to lease these Indian lands for oil, even though such lands are held in trust as a reservation, provided the lease can be made on such terms as will not interfere with the use of the lands by the Indians.

This answers question 1 above enumerated.

Replying to question 2, there is no specific grant of power given the Board except to hold the lands for the use and benefit of the Indians. If a grazing lease can be made on such terms as will not interfere with the use of the lands by the Indians, I believe the law contains sufficient authority for the Board to make same.

Replying to question 3, the right of the Board to keep hunters and trespassers off these lands is unquestionably in the Board as a part of its administration of the trust for which the same are held. Public posting of same would be one way to accomplish this.

Replying to question 4, in administering its trust of these lands for the Indians, the Board, in my opinion, has the right to provide for the fencing of same for pasture for the use and benefit of the Indians. Such pastures might also be fenced when leased provided that their use by the Indians is not thereby interfered with.

All of these lands lie deep in the Everglades, are submerged the major portion of the year, and are uninhabited, but used by the Seminole Indians for hunting alligators, bullfrogs and other wild life. No timber of any consequence other than Buttonwood trees exists in this desolate, marshy, overflowed area. It would therefore appear that the only inquiry of any practical significance in the first four questions submitted would have to do with leasing the lands for oil, gas and petroleum purposes.

In two cases by the Supreme Court of the United States, *U. S. v. Shoshone Tribe*, etc. 82 L. Ed. 1213, and *U. S. v. Klamath and Moadoc Tribes*, et al. 82 L. Ed. 1219, the Court held that a treaty setting apart an area as a reservation for the use of the Indians, although the fee simple title remained in the government, was to be construed as limiting the power of the United States to give to others or to appropriate to its own use any part of the lands without rendering or assuming the obligation to pay just compensation to the tribe with whom such treaty existed. These cases are authority, in my opinion, for the proposition that land vested in the Board of Commissioners of State Institutions for use of the Seminole Indians for reservation, contemplates also the minerals, timber and grazing privileges connected with the land's potential uses and productiveness, and I, therefore, think that the proceeds accruing from any leases made of such lands will constitute trust funds for the benefit of the Seminole Indians as long as the Commissioners hold the lands in trust for them. This trust is a two-fold one, to-wit: "for the perpetual benefit of the Indians and as a reservation for them."

Replying to question 5, it is my opinion that the duties of the Board of Commissioners of State Institutions are of the highest quality of trust and involve discretionary management, and hence, neither class may be delegated.

## CHAPTER XVI

### PENSIONS AND WAR VETERANS

#### CONFEDERATE PENSIONS

October 15, 1943.—043-271.

##### PAYMENT TO ESTATE

**QUESTION:** Should the State Board of Pensions authorize the issuance of a warrant to the estate of a Confederate veteran covering the time from June 12, 1939, the effective date of Chapter 19371, Acts of 1939, which granted a pension, to the date of his death February 6, 1941, no pension ever being paid for the reason that proof of his service was not submitted to the Board?

*To Miss Roumelle Bowen, Secretary, State Board of Pensions:*

It is my opinion, from an examination of the decision in the case of State ex rel. Givens v. Holland, 147 Fla. 396, 2 So. 2d 735, that the State Board of Pensions was required to place the name of the veteran upon the Pension Roll of the State of Florida and the Comptroller required to issue a warrant against the Pension Fund in the same manner and amount that warrants are issued to other pensioners of the State of Florida who rendered service to the Confederacy. The death of said veteran having occurred before the above decision could be followed, a warrant covering the period from the effective date of Chapter 19371 to the date of his death should be issued by the State Board of Pensions to his personal representative.

October 18, 1943.—043-272.

##### WIDOW UNDER FORTY—ELIGIBILITY AFTER REMARRIAGE

**QUESTION:** Is a Confederate soldier's widow under forty, who remarries, prevented from drawing a pension?

*To Miss Roumelle Bowen, Secretary, State Board of Pensions:*

In the case of Holland v. State, 146 Fla., 308, 200 So. 695, the Court stated that the effect of Chapter 18047, Acts of 1937, now Section 291.07, Florida Statutes, 1941, was to eliminate that part of Section 2099, C. G. L., containing the words:

". . . subsequent marriage shall not prevent any widow over the age of forty years of a deceased soldier from drawing a pension under the provisions of this law. . . ."

My view is, accordingly, that a widow who was at the death of her husband entitled to a pension, and who remarries, while under forty, is eligible for a pension.

#### VETERANS' GUARDIANSHIP LAW

January 15, 1943.—043-18.

##### GUARDIANSHIP PROCEEDINGS—VETERANS' ESTATES

**QUESTION:** 1. To what guardianship proceedings is the flat fee of ten (\$10.00) dollars, provided for by Section 294.11, Florida Statutes, 1941, made applicable?

2. Is it necessary in guardianship proceedings to record the application for guardianship and the oath of the guardian?

*To Honorable George W. Burke, Chief Attorney, Veterans' Administration,  
Bay Pines, Florida:*

Chapter 293, 294 and 744 Florida Statutes, 1941, relate to the guardianship of the estates of infants, insane persons and incompetents, in the County Judge's Court. Chapters 293 and 294 relate to the guardianship of the estates of veterans of the armed forces of the United States and their dependents, received or derived from the Veterans' Administration. The provisions of these two chapters appear to be confined to the guardianship of funds, or property derived from funds, received or to be received from the Veterans' Administration, and do not appear to relate to any other estate of the ward (Sections 293.01, 294.01 and 294.07, Florida Statutes, 1941). Chapter 744 is the general Guardianship Law of this State, which applies generally to the estates of infants and insane persons. There is no provision in either Chapter 293 or 294 authorizing the holding of the general estate of a ward by a guardian appointed for a veteran under said chapters; however, there is a provision for the holding of the estate of a veteran, received or derived from the Veterans' Administration, by a guardian appointed under the general Guardianship Laws of this state (Section 294.07, Florida Statutes, 1941). Under said Section 294.07 "such general guardian shall be responsible and be subject to the provisions and penalties contained in the aforesaid acts of congress as well as the requirements pertaining to guardians as set forth in Chapters 293 and 294." Although a guardian may have been appointed under and pursuant to Chapters 293 and 294, if a general guardian is appointed, under the general Guardianship Laws, the guardianship existing under said Chapters 293 and 294 must be settled up and closed (Section 294.07, Florida Statutes, 1941) and the entire estate of the ward handled by the general guardian, subject, however, to the requirements of Chapters 293 and 294, as to that part of the estate derived from funds furnished or to be furnished by the Veterans' Administration, insofar as said chapters relate to the duties and obligations of the guardian; in other words, Chapters 293, 294 and 744 all relate to the estate of the ward received from the Veterans' Administration while only Chapter 744 relates to the remaining estate.

The provisions of Section 294.11, Florida Statutes, 1941, clearly apply to guardianships existing under and by virtue of Chapters 293 and 294, and fix a flat fee of ten (\$10.00) dollars for: (1) the filing and recording of the petition, (2) granting the petition and entering a decree thereon, (3) approving and recording the bond, (4) issuing the letters of guardianship, (5) furnishing two certified copies of the letters and of the bond to the Veterans' Administration, and (6) the performance of any other duties mentioned in the said section. This section seems to require the recording of the petition when filed under and pursuant to Chapters 293 and 294; however, we have been unable to find any statutory requirement for the recording of petitions under the general Guardianship Laws.

Under the general laws the initial pleading in the County Judge's Court is the petition or complaint (Section 36.12, Florida Statutes, 1941) which is required to be filed before process may be issued. However, so far as we have been able to find, there is no requirement that it be recorded. Neither is there any requirement that the oath of the guardian be recorded, the only requirement, under the general laws, being that it be filed (Section 744.03, Florida Statutes, 1941).

It is clear from a general reading of the applicable statutes and laws that funds received from the Veterans' Administration or property derived from such funds, even when handled as a part of a general guardianship, should not be charged with any part of the expense of administering the remaining estate of the ward; only such of the expenses as may be applicable to the handling of the estate derived from funds

furnished by the Veterans' Administration may be charged against such funds.

Although the estate of a veteran, derived from funds furnished by the Veterans' Administration entirely, may be administered through a guardianship under the general laws, it is expressly made subject to the terms and conditions of Chapters 293 and 294. This being true, I am of the opinion that Section 294.11, Florida Statutes, 1941, should be applied and its requirements complied with, at and for the fees therein mentioned.

From the above and foregoing statutes, matters and things we are of the opinion that:

1. The ten (\$10.00) dollar flat fee, provided for by Section 294.11, Florida Statutes, 1941, is applicable to all guardianships of veterans' estates had under Chapters 293 and 294, Florida Statutes, 1941; and to all guardianships of veterans' estates had under the general Guardianship Laws where the only estate to be administered was received, or derived, from funds received from the Veterans' Administration.

2. It is necessary to record the application for guardianship, but not the oath of the guardian, in all proceedings under Chapters 293 and 294, Florida Statutes, 1941; but it is not necessary to record either the petition or oath in proceedings under the general laws.

3. In guardianship proceedings under the general laws wherein the general estate of the ward is being administered together with funds or property derived from the Veterans' Administration, the funds or property derived from the Veterans' Administration should not be required to bear any of the expenses of administering the general estate of the ward.

In conclusion permit me to state that I am only permitted by law to render official opinions to state officers, boards and commissions; for which reason this opinion should be taken and considered as unofficial.



## CHAPTER XVII

### DRAINAGE

#### GENERAL

September 26, 1944.—044-289.

#### EVERGLADES DRAINAGE DISTRICT

**QUESTION:** May the Clerk of the Circuit Court continue to issue tax deeds, without public or auction sale, under Section 8, Chapter 20658, Acts of 1941, as he was empowered to do by Section 62, Chapter 14717, Acts of 1931?

*To Honorable John S. Burwell, Fort Lauderdale, Florida:*

Section 62 provides for the issuance of tax deeds, after certain publication of notice of application therefor, to the holder of any unredeemed certificate sold for drainage taxes, and it does not appear that public auction, inviting competitive bidding, is required thereunder.

Upon a search made for the purpose of determining whether this section has been affected in any manner by subsequent legislation, you are advised that in my judgment it is unaffected by any later enactments, except as the redemption time of certain certificates may have been extended by Section 11, Chapter 17902, Acts of 1937, as amended by Section 1, Chapter 19276, Acts of 1939.

It is my opinion, therefore, that after publication of the notice of application runs for the required time, a tax deed may be issued by the Clerk upon application of a holder of a valid unredeemed tax certificate.

February 4, 1943.—043-39.

#### SCHOOL LANDS—DRAINAGE TAXES

**QUESTION:** Are school lands subject to the payment of drainage taxes?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

It appears from the request for opinion that the lands in question were granted to the State for school purposes, under the provisions of the act of the Congress of the United States, approved March 3, 1845, and have never been conveyed by the State or any of its agencies.

It is my opinion that such lands are not subject to the payment of a drainage tax as any attempt to enforce a drainage levy against such lands would be contrary to Sections 4 and 5, Article XII of the Constitution of the State of Florida. (See *Southern Drainage District vs. State*, 112 So. 561).

## CHAPTER XVIII

### MOTOR VEHICLES

#### TRAFFIC ON HIGHWAYS

August 28, 1944.—044-255.

#### DRUNKEN DRIVING—PROSECUTION

QUESTION: 1. Was Section 860.01, Florida Statutes, 1941, repealed by Section 20, Chapter 20578, Laws of Florida, Acts of 1941, now appearing as Section 317.20, Florida Statutes, 1941?

2. If Section 860.01, Florida Statutes, 1941, was repealed by the aforesaid section of the 1941 Act, then, was it revived and reinstated by Section 7, Chapter 22000, Laws of Florida, Acts of 1943, which purported to amend it?

3. If Sections 317.20 and 860.01, Florida Statutes, 1941, are each still in full force and effect, under which section shall offenses for drunken driving be prosecuted?

*To Honorable George R. Hitchcock, County Prosecuting Attorney,  
Bradenton, Florida:*

1. Section 860.01, Florida Statutes, 1941, defines several offenses (Patterson v. State, 128 Fla. 539, 175 So. 730). The offenses seem to be (a) driving a motor vehicle while in an intoxicated condition, (b) driving a motor vehicle when under the influence of intoxicating liquors to such an extent as to deprive the driver of full possession of his normal faculties, (c) damaging the property or persons of others when driving a motor vehicle while intoxicated, and (d) causing the death of another when driving a motor vehicle while intoxicated. Section 317.20 defines three offenses, two of which are connected with narcotic drugs and the other prohibiting the driving of a motor vehicle when under the influence of intoxicating liquors to the extent that one's normal faculties are impaired. From this analysis of the two sections, we find that Section 860.01 defines four offenses against driving while intoxicated, unless the offenses designated as (a) and (b) above be construed as one and the same offense. The language in the statutes indicates a possible intent to charge two offenses instead of one. There is nothing in Section 317.20 relating to damaging property or persons, or causing the death of persons, as is contained in Section 860.01. Repeals by implication are not favored (State v. Gadsden County, 63 Fla. 620, 58 So. 232), and require that there be a positive inconsistency or repugnancy between the two laws (State v. Cone, 139 Fla. 437, 190 So. 689). It is therefore clear that Section 317.20 did not repeal Section 860.01 in its entirety, because Section 860.01 charged offenses not included in Section 317.20. (Calhoun v. Baden, Fla. 15 So. 2nd. 444). The mere fact that one may be indicted under two different statutes does not make the statutes repugnant to each other (Young v. State, 141 Fla. 529, 142 Fla. 361, 195 So. 569). The Legislature itself seems to have construed Section 860.01 as having remained in full force and effect when it amended said section in 1943. I am, therefore, of the opinion that both sections remain in full force and effect.

2. Having held that Section 860.01 was not repealed by the subsequent Act, no question of revival or reinstatement is presented, therefore the second question needs no answer.

3. Indictment for causing injury to persons or property, or causing the death of persons, is not covered by the provisions of Section 317.20.

so that indictments for those offenses can be filed under that section. This being true, indictments for such offenses must be filed under Section 860.01 or some other applicable law. There are doubtless many charges of drunken driving which may be prosecuted under either Section 317.20 or Section 860.01. The choice of the section under which prosecution is to be had would seem to be left to the discretion of the prosecutor.

### MOTOR VEHICLE COMMISSIONER

August 17, 1943.—043-211.

#### FUNDS TRANSFERRED—OFFICE EXPENSES; PAYMENT

**QUESTION:** Does the Act passed by the 1943 Legislature transferring \$26,635.89 from the Auto Theft Refund Fund to the Auto Theft Expense Fund, authorize use of this money for the payment of current bills ordinarily paid from the Auto Theft Expense Fund?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

The Act to which you refer is Chapter 22043, Laws of Florida, Acts of 1943, and the provision therein which is applicable to the question submitted, reads as follows:

"(a) All moneys credited to the Auto Theft Refund Fund are transferred to and shall become a part of the Auto Theft Expense Fund as provided by Section 319.08 of the Florida Statutes, 1941."

Inasmuch as the Legislature, by Chapter 22043, has caused said moneys to be transferred and made a part of the Auto Theft Expense Fund, it is my opinion that they may be used as provided in said Section 319.08, which section expressly authorizes payment of specified current expenses of your office out of such fund.

March 14, 1944.—044-77.

#### TEMPORARY LICENSE PLATES

**QUESTION:** Has the Motor Vehicle Commissioner authority to issue a license plate to a plaintiff who has recovered possession of a motor vehicle under a writ of replevin, pending trial?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

Ordinarily the statutes contemplate that when property is replevied it may be used by the party replevying the same pending outcome of the litigation, subject however to damages being recovered for its use in case it is finally determined in the replevin action that it was wrongfully replevied.

In this situation I think that you would be authorized to accept an application from the plaintiff in replevin setting up the facts of the case and you would then be authorized to register the automobile in his name temporarily pending the outcome of the litigation. Based on such an application and registration you would be authorized to accept from the plaintiff the required amount for a license plate and issue him some form of special license to be determined by you without, however, issuing a certificate of title, such license to continue in effect until the litigation involving the right of possession to the motor vehicle has been finally adjudicated as provided in the replevin statutes.

This opinion does not modify in any way my opinion to you of August 7, 1942, in which I advised that whenever a court of competent jurisdiction has entertained a replevin action no new title certificate should be issued covering the motor vehicle until the Court has determined the question of ownership and right of possession. That opinion referred to regular motor vehicle title certificates which unconditionally determined the question of

title, whereas this opinion holds that under the statutes temporary licenses may be issued covering replevied motor vehicles pending the litigation without prejudice to the rights of either of the parties to the action.

### TITLE CERTIFICATES

January 22, 1943.—043-26.

#### ABANDONED VEHICLES—SEIZURE AND SALE

**QUESTION:** The City of Miami Beach, Florida has enacted an ordinance providing for the seizure and sale of abandoned motor vehicles. Should the Motor Vehicle Commissioner issue a title certificate to a purchaser at a sale made pursuant to the provisions of such ordinance upon proper proof being made?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

The Motor Vehicle Commissioner in determining the ownership of a motor vehicle for the purpose of issuing a title certificate, is without authority to inquire into the validity of a city ordinance pursuant to which such motor vehicle was purchased by the applicant for a title certificate, as this is a matter which can only be judicially determined by the courts.

I am therefore of the opinion that where a city enacts an ordinance providing for the seizure and sale of abandoned motor vehicles, the purchaser of a motor vehicle at a sale made pursuant to such ordinance is entitled to have a title certificate issued to him for such motor vehicle, upon proper application being made therefor and sufficient information being furnished the Motor Vehicle Commissioner to disclose the existence of the ordinance and the purchase of the motor vehicle by the applicant at such sale, unless such ordinance has been declared invalid or unconstitutional by a court of competent jurisdiction.

November 29, 1944.—044-332.

#### FEE FOR RECORDING SATISFACTION OF A LIEN

**QUESTION:** Is it the duty of the debtor or the creditor lien holder or his or its assignee to pay the 50c fee to the Motor Vehicle Commissioner for recording satisfaction of a lien on a motor vehicle, after the debt secured thereby has been discharged?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

It is my opinion based on the provisions of Sections 319.16, 319.19, 701.03, and 701.04, Florida Statutes, 1941, read in pari materia, as well as the departmental construction adhered to since the enactment of Chapter 20917, Acts of 1941, that it is the responsibility of the lien holder (creditor) or his or its assignee to pay the 50c fee for recording the satisfaction.

### LICENSES

March 27, 1943.—043-92.

#### ARMY POST EXCHANGE OPERATING TRANSPORTATION LINE

**QUESTION:** Is a motor vehicle owned by a United States Army Post Exchange and operated by such Post Exchange over fixed routes outside of an army base transporting civilian workers to and from such army base for a fixed charge, required to purchase a Florida motor vehicle license plate?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

All motor vehicles operated within the State of Florida are required to have a Florida motor vehicle license plate, with certain specified excep-



tions. The pertinent part of Section 320.10, Florida Statutes, 1941, relating to exemption of motor vehicle license plates, reads as follows: "... owned and operated by the federal government."

The Supreme Court of the United States has said that a United States Army Post Exchange is an arm of the Federal Government. However, that Court also said that the object of a Post Exchange is to provide convenient and reliable sources where soldiers can obtain their ordinary needs. When a United States Army Post Exchange operates a transportation line outside of an army base transporting civilians for which they make a charge, such Post Exchange is engaging in activities outside of the object of an Army Post Exchange.

I am therefore of the opinion that a motor vehicle owned by a United States Army Post Exchange and operated by such Post Exchange, outside of an army base, and within the State of Florida, transporting civilians for a charge, is required to have a Florida motor vehicle license plate, as provided by the laws of this state.

May 21, 1943.—043-114.

#### FEDERAL GOVERNMENT VEHICLES—EXEMPTION

**QUESTION:** Should a motor vehicle owned by the Federal Government and operated by a certain Nickel Company be required to purchase a Florida motor vehicle license plate?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

All motor vehicles operated within the State of Florida are required to have a Florida motor vehicle license plate, with certain specified exceptions. The pertinent part of Section 320.10, Florida Statutes, 1941, relating to the exemption of motor vehicles from the purchase of license plates, reads as follows: "... owned and operated by the federal government."

I have examined the contracts between the said Nickel Company and the Defense Plant Corporation and find nothing contained therein sufficient to bring the motor vehicles operated in this state by said Nickel Company within the exemption provided by Section 320.10, supra.

I am therefore of the opinion that any motor vehicle owned by the Federal Government and operated by the Nickel Company is required to have a motor vehicle license plate as provided by the laws of the State of Florida, if and when such motor vehicle is operated in the State.

March 27, 1943.—043-91.

#### FEDERAL GOVERNMENT VEHICLES—LEASE TO INDIVIDUALS; CORPORATIONS

**QUESTION:** Should a motor vehicle owned by the Federal Government and leased or rented to a private individual or corporation be required to purchase a Florida motor vehicle license plate?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

All motor vehicles operated within the State of Florida are required to have a Florida motor vehicle license plate, with certain specified exceptions. The pertinent part of Section 320.10, Florida Statutes, 1941, relating to exemption of motor vehicle license plates, reads as follows: "... owned and operated by the federal government."

I am therefore of the opinion that any motor vehicle owned by the Federal Government which has been leased or rented by it to anyone other than a branch of the Federal Government is required to have a motor vehicle license plate as provided by the laws of the State of Florida, if and when such motor vehicle is operated in this state.

October 21, 1943.—043-279.

#### FEDERAL GOVERNMENT VEHICLES PRIVATELY OPERATED

**QUESTION:** Are motor vehicles owned by the Federal Government and leased to governmental agencies but which are operated on the public highways of the State by a Florida corporation, exempt from state motor vehicle license taxes inasmuch as these agencies are corporate agencies of the Federal Government, created by the Reconstruction Finance Corporation?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

I have examined a copy of the agency agreement between a Defense Supplies Corporation and a Florida Pipeline Company, to which agreement another pipeline company, a Delaware corporation, is also a party. The two companies last mentioned are private corporations. It is stated in the agency agreement that the Delaware Company is the parent company of the Florida Pipeline Company. It is also well known that the Delaware Company, which is closely affiliated with two oil corporations, operates its own pipeline system from a town in North Florida into the State of Georgia.

The agency agreement provides that for the duration of the war the two private corporations will complete, manage, operate and maintain the common carrier petroleum pipeline system of the Defense Plant Corporation which it has leased to the Defense Supplies Corporation. The system extends from Carrabelle across the State to Jacksonville, Florida. Under the arrangement the motor vehicles of the Defense Plant Corporation leased to the Defense Supplies Corporation are turned over to the Florida Pipeline Company to operate and use in connection with the performance of its part of the agency agreement in completing, managing and operating the system.

In the agency agreement it is provided that the Florida Pipeline Company will pay taxes on its own account but it will not pay taxes on the account of the Defense Supplies Corporation unless the same are approved by the latter, since the Defense Supplies Corporation is an agency of the Federal Government and exempt from general taxation.

It is true that the Defense Plant Corporation and the Defense Supplies Corporation are exempt from certain taxes, (see Section 610, Title 15, Commerce and Trade, U. S. C. A.) and it is conceded that the motor vehicles of this government corporations ordinarily are exempt from State motor vehicle license taxes. Moreover, Section 320.10, Florida Statutes, 1941, provides that motor vehicles owned and operated by the Federal Government shall not be required to pay motor vehicle license taxes.

In this instance, two private corporations are engaged by a government corporation under said agency agreement to take over for the duration of the war the management, operation and maintenance of a common carrier pipeline system, to prescribe tariff rates, select management personnel and employees, fix salaries and operating expenses subject only to the supervisory regulation of the government corporation. It is true that the agency agreement provides that the two private concerns shall operate the pipeline system without fees, profit, or other remuneration, yet it is provided that the government corporation will fully reimburse the private corporations for all salaries, costs and expenses incurred in the management, operation, and maintenance of the common carrier pipeline system. Under the agency agreement the private corporations will operate and use these motor vehicles just as if they had legal title to them in carrying out their engagements under the contract. For all practical purposes the government has turned the management and operation of the system over to private management for the duration of

the war, and if not for private gain, certainly for considerations beneficial to the private corporations and their affiliates.

In such a situation, it is my opinion that the private corporations should, by reason of the protection and benefits they receive from the State Government, including the use of its highways, pay on their own account motor vehicle license taxes on the motor vehicles turned over by the government corporation to them for operation and use, just as other private corporations operating motor vehicles in the performance of their corporate businesses are required to pay such taxes as a part of the contribution made by private taxpayers to defray the costs of State Government.

The Federal Government cannot by an agency contract transfer its statutory exemption from State taxation to private corporations. See 61 C. J. 404.

The fact that the titles to the motor vehicles remain in the government corporation while they are used by the private corporations does not affect the situation. In 61 C. J. page 361, it is stated:

"But when federal property is placed in a private enterprise for gain, the immunity has no application. So the State may tax . . . property the legal title to which is in the United States but the beneficial ownership is in another."

For general statements concerning the liability for state taxation of private contractors and agents of the Federal Government see 18 A. L. R. 1163, 97 A. L. R. 1257 and 114 A. L. R. 347.

In my opinion you should require the private corporations to secure proper license plates for these motor vehicles during the period in which they are used and operated by such corporations.

November 6, 1943.—043-302.

#### NONRESIDENTS EMPLOYED IN THE STATE—LIABILITY

**QUESTION:** Are nonresidents liable for motor vehicle license taxes when they accept gainful employment, or engage in any trade, profession or occupation in this state but receive compensation for their work from employers or others residing outside the State?

*To Honorable Henry J. Driggers, Motor Vehicle Commissioner:*

Section 320.38, Florida Statutes, 1941, provides:

"In every case where a nonresident shall accept employment or engage in any trade, profession or occupation in the State of Florida, such nonresident shall be required to register his motor vehicles in this State if such motor vehicles are proposed to be operated on the highways of the State of Florida."

You will note that this section does not provide any exemption for such nonresidents based on whether or not compensation is received from employers or others residing in the State or outside of the State.

It is, therefore, my opinion that nonresidents employed or engaged in trades, professions, or occupations in this state are not exempt from State motor vehicle license taxes because they receive compensation for their work or services from employers or others residing outside of this state.

September 7, 1944.—044-264.

#### TOWED VEHICLES

**QUESTION:** 1. Is a motor vehicle license tag required on a motor vehicle that is being towed on the public highways by another licensed motor vehicle?

2. If it is my opinion that such a license is not required on the towed vehicle, would the answer be different if the vehicle being towed has freight in it?

*To Honorable Vassar B. Carlton, County Judge, Brevard County, Titusville, Florida:*

In view of the definition of a "motor vehicle," a "trailer" and a "truck" in Section 320.01, Florida Statutes, 1941, it is my unofficial opinion that if a motor vehicle is towed by another vehicle on the public highways for some commercial, agricultural or similar purpose (except for the mere repair, storage or delivery of the towed vehicle), irrespective of whether or not it is loaded with freight, it should carry a motor vehicle license tag; provided, of course, that such towing is not in an isolated case and is contemplated for repetition.

In isolated instances where the motor vehicle is towed for a short distance for the sole purpose of placing it in garage for repairs or in order to store it, or where it is towed in order to deliver it into the keeping of another person, I think that the practical administration of the motor vehicle laws will admit of such exceptional instances and that such towing is permissible without securing a license tag for the motor vehicle.

#### HIGHWAY PATROL

August 23, 1943.—043-231.

#### TRAFFIC CASES—PATROLMEN; JUSTICES OF THE PEACE

**QUESTION:** Should patrol officers of the Florida Highway Patrol take traffic cases, where arrests are made by the patrol officers, before Justices of the Peace?

*To Honorable J. J. Gilliam, Director, Department of Public Safety:*

Section 321.05, Florida Statutes, 1941, requires patrol officers of the Florida Highway Patrol to immediately deliver to the Sheriff of the county at the county seat any person arrested by a patrol officer for violating a State Traffic Law, or that the appearance bond of the person arrested, in case he is released on bond, be immediately delivered to the Sheriff.

Section 901.23, Florida Statutes, 1941, (Section 23, Chapter 19554, Acts of 1939, the Criminal Procedure Act of 1939) provides that an officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate having jurisdiction in the county in which the arrest occurs, and shall make before the magistrate a complaint which should set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

The Sheriff is the executive officer of all courts in the county (except Municipal Courts) created by the Laws and Constitution of Florida, including the Justice of the Peace Court (Section 37.16, Florida Statutes, 1941). The Constable is of corresponding status in that court.

The statutes dealing with the Highway Patrol which prescribe the concomitant duties of the patrol officers and the Sheriffs do not undertake in any way to restrict the taking of traffic cases where arrests are made by patrol officers to any particular court having jurisdiction, including



Justice of the Peace Courts. The provisions of the Criminal Procedure Act of 1939, commonly known as the Criminal Code, apply with the same force to State Traffic Law violation cases as they do to other criminal cases, and govern the commitment, court jurisdiction and venue of traffic cases.

While the statutes do not specify any particular court or courts, having jurisdiction, in which such traffic cases should be taken, since the persons arrested by the patrol officers or their appearance bonds are required to be delivered to the Sheriff, it follows that the statutes contemplate that the patrol officers should work in close cooperation with the Sheriffs in taking these traffic cases into court, and for that purpose it is advisable that an appropriate procedure be formulated by your Department and each Sheriff for the convenient and efficient handling of such cases in the local courts having concurrent jurisdiction.

### DRIVERS' LICENSES

March 30, 1943.—043-90.

#### DIRECTOR—DEPARTMENT OF PUBLIC SAFETY

**QUESTION:** What is the authority of the Director of the Department of Public Safety over the supervisor and employees of the Drivers' License Division?

*To Honorable J. J. Gilliam, Director, Department of Public Safety:*

Chapter 321, Florida Statutes, 1941, the Highway Patrol Law, and Chapter 322, Florida Statutes, 1941, the Drivers' License Law, were both enacted at the same time and as a part of the same bill, Chapter 20451, Acts of 1941.

Subsection (2) of Section 321.01, Florida Statutes, 1941, reads as follows:

"The Department of Public Safety shall consist of two divisions as follows: (a) Division of the Florida highway patrol and (b) Division of state motor vehicle drivers' licenses."

The pertinent part of Section 321.01, Florida Statutes, 1941, reads as follows:

"The board shall employ a director of the state department of public safety, who shall also be the commander of the Florida highway patrol . . ."

The pertinent part of Section 322.02, Florida Statutes, 1941, reads as follows:

"The board shall employ a supervisor, and he is hereby charged with the duty of serving as the executive officer of the division of state motor vehicle drivers' licenses, department of public safety, insofar as the administration of this chapter is concerned. He shall be subject to the supervision and direction of the director of said department of public safety, and his official actions and decisions as executive officer shall be conclusive unless the same are superseded or reversed by said director, the executive board, or by a court of competent jurisdiction. The executive board, through its director, shall make and adopt rules and regulations for the orderly administration of this chapter."

The Director of the State Department of Public Safety is Director of both the Division of the Florida Highway Patrol and the Division of State Motor Vehicle Drivers' Licenses.

I am therefore of the opinion that the Director of the Department of Public Safety has full authority over the Division of State Motor Vehicle Drivers' Licenses, and all employees thereof, including the supervisor, are under his supervision and direction, subject only to the orders of the Executive Board.

August 29, 1944.—044-257.

NONRESIDENT MILITARY PERSONNEL STATIONED WITHIN THE  
STATE

**QUESTION:** What is the position of the State of Florida with respect to Public Act 415, 78th Congress, approved July 3, 1944, amending Section 514 of the Soldiers' and Sailors' Relief Act, providing that personal property of military personnel stationed in this state who are residents of other states, shall not be subject to taxation in this state, with certain exceptions, insofar as said Act of Congress affects laws of the State imposing motor vehicle licenses on such persons and their dependents?

*To Commander H. T. Hodgskin, U. S. Naval Air Station, DeLand, Florida:*

Opinions rendered by me to persons other than state or county officials are necessarily unofficial.

In answer to your question I call attention to the fact that said Act of Congress permits local taxation of personal property in certain situations and that the State Laws imposing motor vehicle licenses permit exemptions to nonresidents. Therefore, both the Federal Act and said State Laws contemplate considerable practical departmental administration to meet the various conditions and contingencies that necessarily will arise under said laws. Furthermore, it is my unofficial opinion that the Act of Congress and the State Motor Vehicle License Laws, because of the exemptions allowed nonresidents by our State Laws and because of the exceptions in the Federal Act permitting personal property taxation, by the State, of nonresident military personnel stationed within the State, in certain cases, can be harmonized and given separate fields of operation so that the Federal Act and the State Laws will not be brought into conflict.

I think that this has been accomplished by the Bulletin of the Motor Vehicle Department of the State of Florida dated August 24, 1944 (copy of which is enclosed), which fairly and reasonably covers the practical administration of the subject matter and avoids a conflict between the Federal Act and the State Laws and the necessity for an opinion dealing with questions concerning the delegated and reserved powers of the Federal and State Governments.

As to drivers' licenses, Section 322.04, Florida Statutes, 1941, exempts a nonresident who has in his immediate possession a valid operator's license issued to him in his home state.

February 1, 1943.—043-31.

SCHOOL BUSES—ISSUANCE OF TEMPORARY LICENSE

**QUESTION:** Many school officials are unable to secure the services of bus drivers with special chauffeur's licenses on account of the 21 year minimum age requirement, and the State Board of Education has approved the attached resolution relative to this matter. Can the Department of Public Safety issue a temporary special chauffeur's license for the duration of the present emergency to persons between 18 and 21 years of age, provided school boards file a written request and statement that they are unable to get bus drivers 21 years old, and the person for whom such license is requested meets the requirements of the resolution, approved by the State Board of Education on January 12, 1943, relative to Section 814, School Code, "Qualifications of school bus drivers"?

*To Honorable J. J. Gilliam, Director, Department of Public Safety:*

The "Driver's License Law," Section 322.06, Florida Statutes, 1941, provides that "No person who is under the age of twenty-one years shall drive any motor vehicle while in use as a school bus, for transportation of pupils to and from school, . . ." and Section 322.39, Florida Statutes, 1941,

makes the violation of the provisions of Section 322.06, supra, a misdemeanor.

I have formerly rendered opinions on this question in which I held that the Department of Public Safety has no authority to issue a temporary special chauffeur's license to persons under the age of twenty-one years; and the question as now posed by your letter and the attached resolution fails to present anything that would justify a reversal of my former opinions.

I, therefore, must adhere to my former opinions on this question, rendered on September 8, 1941, and June 19, 1942.

The foregoing is my legal interpretation of the matters submitted. If the statute prohibiting the use of persons under twenty-one years of age for driving school busses were in the School Code, there might be a plausible way of passing the responsibility of overlooking this statute to the County School Boards in conjunction with confirmation by the State School Board. But such is not the case. This statute is a part of the general law of the state. Also, the criminal statutes make it a criminal offense to violate the nonuse provision aforesaid.

In my opinion the safeguards of the submitted resolution thrown around the resort to, and selection of, persons under twenty-one years for this service, are the best that could be conceived, and if we were in a position to accept this as compliance with the prohibitive statutes, nothing more could be asked for by way of salutary law.

I am fully aware that during the present emergency strict and rigid enforcement of said Section 322.06 might, in some localities, make impossible the operation of school busses, and thereby defeat the declared purposes of school laws— to insure "services adequate to meet the educational needs of all citizens of the state."

In view of the thoroughness of the safeguards prescribed by such resolution, I am willing to say that if the State School Board will accept the responsibility of approving the proposed resolution and the course outlined in it, upon strict compliance with such course by those proposing to use persons between the ages of 18 and 21 for drivers on these school busses, state authorities would be justified in not enforcing the prohibitive statute, and I would be willing to accede to the substitution of the emergency measure proposed under such circumstances; provided that the matter is presented to the next Legislature by the Governor with appropriate advice and recommendations to cover both the reason for disregarding the statute during the short period of time which elapses between now and the holding of its session, and the Governor's recommendation for remedial legislation.

If this procedure is followed, I think such bus drivers should first obtain a regular "chauffeur's license" which can be issued, under the law, to persons not under 18 years of age.

#### **Section 814: Qualifications of School Bus Drivers**

WHEREAS, the war emergency has brought about conditions which have resulted in many of the regular school bus drivers giving up their positions in a number of counties throughout the state, and

WHEREAS, conditions are such that it is becoming increasingly difficult for these drivers to be replaced by able bodied qualified drivers who are over twenty-one years of age, and

WHEREAS, there have been situations in the State this year where considerable numbers of children have not been able to get to school because qualified school bus drivers over twenty-one years of age could not be located,

THEREFORE BE IT RESOLVED, that the Attorney General and the Director of the Florida State Highway Patrol determine, as soon as

practicable, whether it might not be possible, during the emergency, for properly qualified persons over eighteen years of age and under twenty-one years of age to be permitted to drive school buses when no other qualified drivers can be located.

BE IT FURTHER RESOLVED, that if the Attorney General and the State Highway Director determine that qualified drivers between eighteen and twenty-one years of age may be used during this emergency, such drivers shall be permitted to serve only when the following conditions are met:

(1) The County Board and the County Superintendent shall file with the State Superintendent a statement certifying that no other qualified driver over twenty-one years of age is available for the route. This certification shall be accompanied by a recommendation signed by a majority of the patrons of the route stating that the proposed driver is considered by them to be reliable and that they are willing for him to serve as the driver of the bus which transports their children.

(2) Before any such person actually drives a school bus in any county the County Superintendent shall have in his files a statement or telegram from a properly authorized official of the insurance company carrying the liability insurance required by section 808 (1) of the School Code, stating that this required insurance coverage will not in any way be jeopardized by the fact that the driver is between eighteen and twenty-one years of age provided that he meets the requirements set forth above.

Approved by State Board, January 12, 1943



## CHAPTER XIX

### HIGHWAYS, BRIDGES AND FERRIES

#### STATE ROADS

March 27, 1944.—044-102.

##### ERRONEOUS CONDEMNATION

**QUESTION:** The Federal Government condemned certain county roads belonging to Calhoun County but erroneously named the State Road Department as their owner in the condemnation proceedings and will pay the amount awarded for the roads to the State Road Department. The State Road Department desires to deposit the award funds when received in the State Treasury and draw its requisition for a state warrant to pay the funds over to Calhoun County. Has the Comptroller authority to approve such requisition?

*To Honorable J. M. Lee, State Comptroller:*

Sections 341.14, 341.16 and 341.21, Florida Statutes, 1941, confer the power of eminent domain on the State Road Department to acquire lands and property necessary and useful for road building purposes. Sections 341.16, and 341.42, Florida Statutes, 1941, confer upon the Department the power to purchase lands for the same purposes. Section 12 of the Declaration of Rights and Section 29 of Article XVI of the State Constitution as well as Section 341.25, Florida Statutes, 1941, read in connection with the foregoing sections have been construed by the Supreme Court of Florida to require the Department to pay for any property taken by it for which it has not first paid just compensation. *Rosenbaum & Little v. State Road Department*, 129 Fla. 723, 177 So. 220; *State Road Department v. Tharp*, 146 Fla. 745, 1 So. 2d 868; *State Road Department v. Bender*, 147 Fla. 15, 2 So. 2d 298.

If the State Road Department did not turn over to the county the proceeds of the award erroneously paid to it, as it properly desires to do, it would be equivalent to the said Department's appropriating the physical property of said county roads, or the value thereof, without the consent of the county and without the authority of law.

It is therefore my opinion that you would be authorized to approve the Department's requisition for a State warrant to pay the award funds over to Calhoun County.

However, as a condition to your approval of the requisition I suggest that you request the State Road Department to execute and deliver to Calhoun County an instrument in writing acknowledging that the condemned roads belong to Calhoun County and stating that the amount awarded in the condemnation proceedings brought by the Federal Government is the just value of the roads and is approximately what the Department would have had to pay had it condemned them and that the Department will, upon receiving the award funds, pay them over to the county. I further suggest that you request that the county accept and approve such instrument.

February 14, 1944.—044-53.

##### FUNDS—INVESTMENTS

**QUESTION:** May the State Road Department invest its funds in short term United States Government obligations?

*To Honorable Spessard L. Holland, Governor:*

In reply I wish to advise that I have carefully studied this question and in doing so have examined the authority of the State Road Department as set forth in Chapter 341, Florida Statutes, 1941. Apparently the State Road Department is vested with the authority to set up its own financial program with reference to the building and maintenance of state roads and the purchase of roads and bridges. If, as a result of this program, said Department finds that it has money on hand which it cannot use because of the War Emergency, and if it appears that such money may not be needed for any definite period of time, it then would be proper for the said Department, by resolution definitely setting forth its financial program, and showing the lack of need for the money for a definite period of time, to provide in same for the purchase of any obligation issued by the United States Government that matures at approximately the time that the money will be then needed by the Road Department to carry out its program, provided that said obligations issued by the United States Government are such that when the State Road Department needs such money, the obligations of the United States can be converted into cash without any loss to the Road Department.

#### BOARD OF ADMINISTRATION

January 21, 1943.—043-27.

#### GASOLINE TAX FUNDS—DISPOSITION

**QUESTION:** What proportion of the tax upon gasoline and other petroleum products collected prior to the effective date of Section 16, Article IX of the Constitution, should be placed in the State Roads Distribution Fund?

*To the State Board of Administration:*

You will note that the constitutional provision, *supra*, provides:

"That beginning January 1, 1943, and for fifty (50) years thereafter, the proceeds of two (2¢) cents per gallon of the total tax levied by State law upon gasoline and other like products of petroleum, now known as the Second Gas Tax, and upon other fuels used to propel motor vehicles, shall as collected be placed monthly in the 'State Roads Distribution Fund, etc.'" (Emphasis supplied).

and that the State Board of Administration, created by the said constitutional provision, should have:

"the management, control and supervision of the proceeds of said two (2¢) cents of said taxes and all moneys and other assets **which on the effective date of this amendment are applicable or may become applicable** to the bonds of the several counties of this State, etc." (Emphasis supplied).

Section 1, Chapter 20303, Acts of 1941 (Section 208.04, Florida Statutes, 1941), provides for the levy and collection of six cents per gallon for every gallon of gasoline or other like product of petroleum sold by distributors or dealers, to be made of two separate taxes, viz: "First Gas Tax" and "Second Gas Tax," each of three cents, to be apportioned as provided in the Act. Then follow the provisions as to the distribution of the total tax contingent upon the adoption or rejection of the "Proposed Constitutional Amendment." (Section 16 of Article IX, *supra*).

The Act provides that the levy of the tax is upon the consumer, but shall be paid upon the first sale or transfer within this state, whether by a distributor or dealer, "such distributor or dealer **shall act as agent of the State** in the collection of said tax, whether he be the ultimate seller or not." (Emphasis supplied).

From the foregoing, therefore, I conclude, and you are now advised that, in my opinion, three cents of the total tax of six cents levied by the 1941 Act, supra, and collected by the distributor or dealer prior to January 1, 1943, the effective date of the constitutional provision, supra, should be placed in the State Roads Distribution Fund, upon the theory that collection by the distributor or dealer, the statutory agents of the State, amounts to collection by the State.

There is no question, I take it, as to what proportion of the total tax collected, as above defined, on and after the effective date of the amendment (January 1, 1943), is to be placed in said fund.

January 21, 1943.—043-25.

#### INVESTMENT OF FUNDS OF ONE COUNTY IN BONDS OF ANOTHER COUNTY

**QUESTION:** What is the proper procedure in investing funds of another county in bonds of Hamilton County which have been called for redemption as of February 7, 1943, but for which Hamilton County has not sufficient funds to its credit?

*To the State Board of Administration:*

This seems to require somewhat different treatment than the ordinary inter-county investment, that is, that the funds supplied will probably not be claimed for some time, as have other funds heretofore supplied for the redemption of other bonds of the same county, thus leaving the Board without collateral representing the investment, and with the only evidence thereof consisting of book entries. I have drawn, and submit herewith, a form of investment certificate which I think will suffice as tangible evidence of the transaction, and may be regarded as collateral until the bonds invested in are delivered to you for Madison County's account.

You will note that this form is for matured bonds. The same form, with slight revision, would be applicable to unmatured bonds.

February 11, 1944.—044-50.

#### INVESTMENT OF FUNDS—SHORT TERM GOVERNMENT CERTIFICATES

**QUESTION:** May the Board of Administration's funds be invested in short term government certificates or other classes of Federal Government bonds?

*To Honorable Spessard L. Holland, Governor:*

I have examined the provision of the Constitution that created the Board of Administration, which is Section 16, Article IX of our Constitution. I find it provides that with reference to the authority of the Board,

"The Governor, as chairman, the State Treasurer, and the State Comptroller shall constitute a body corporate to be known as the 'State Board of Administration', which Board shall succeed to all the power, control and authority of the statutory board of administration."

I find that when you requested an advisory opinion of the Supreme Court in 11 So. (2d) 580, you made this identical statement to the Court and it was not questioned. As a matter of fact, it appears to me that the Court concurred in the same. It therefore appears to me that the present Board of Administration has all the power and authority that the old Board of Administration had.

Under Section 344.17, Florida Statutes, 1941, I find the power of the old Board with reference to the investment of sinking funds. It reads:

"The board of administration may invest any sinking funds to the credit of any county or special road and bridge district, or other special taxing district, in the hands of the state treasurer as county treasurer ex officio, in any bonds or treasury certificates of the United States . . . ."

Reading further in the constitutional provision creating the Board of Administration, I find with reference to the powers of investing money, the following:

"In addition to exercising the powers now provided by statute for the investment of sinking funds, said Board may use the sinking funds created for said bonds of any county or special road and bridge district, or other unit hereunder, to purchase the matured or maturing bonds participating herein of any other county or any other special road and bridge district, or other special taxing district . . . ."

The power conferred upon other boards with reference to the investment of sinking funds as applied to the Board of County Commissioners is found in Section 130.12, Florida Statutes, 1941. It reads:

"All money collected to pay the interest, or for a sinking fund of said bonded debt, shall be paid over by the tax collector, or person receiving the same on account of taxes collected or property sold therefor, to the said trustees, or to the other officials or boards to whom may have been transferred by law the duties and obligations formerly devolving upon said trustees, and the said trustees, or the said other officials or boards to whom may have been transferred by law the duties and obligations formerly devolving upon said trustees, are required to pay out of the moneys so received the interest of said county bonds, and to invest the residue in the bonds aforesaid, or if the said bonds cannot be had at par or at such premium as to said trustees or to the said other officials or boards to whom may have been transferred by law the duties and obligations formerly devolving upon said trustees, may seem reasonable and just, then such residue may be invested in United States, state, county or municipal bonds bearing interest; . . . ."

It is obvious that under this section the Bond Trustees appointed by the County Commissioners have the authority to invest the residue of any fund held by them, under the provisions of the foregoing statute, in United States bonds bearing interest. However, Section 344.17 was passed by the 1941 Session of the Legislature and became a law prior to the adoption of Section 16, Article IX of the Constitution and broadened the powers that the Board of Administration would have had under Section 130.12, *supra*.

I am therefore of the opinion that the Board of Administration may now invest any sinking funds to the credit of any county or special road and bridge district or other special taxing district in any bond or treasury certificate of the United States.

January 21, 1943.—043-24.

#### INVESTMENTS—SEPARATE RECORDS BY COUNTY AND BOARD

**QUESTION:** Since its creation in 1929, the Board of Administration has kept separate records of investments made by county officials and those made by the Board of Administration. What is the advisability of consolidating all such investments of the same issue in one account?

*To the State Board of Administration:*

I am of the opinion that all such investments should be carried in one account, regardless of the manner in which they were acquired.



January 5, 1943.—043-1.

PAYMENT OF BONDS, INTEREST, ETC.

**QUESTION:** What is the authority of the Board of Administration to pay bonds, interest coupons, other interest items and costs involved in judgments based upon bonds or other obligations being administered by it?

*To the State Board of Administration:*

With reference to the use of Gasoline Tax Funds, the authority of the Board as presently constituted is not different from that of its statutory predecessor. That is to say, that such Funds may be used to pay bonds issued on or before July 1, 1931, with interest thereon to maturity, or bonds issued to refund the same.

However, since interest after maturity on both bonds and interest coupons are obligations of the issuing unit which might have, under the principle of law enunciated in the case of *State v. Special Road and Bridge District No. 3 of Palm Beach County*, 10 So. (2d) 341, been included in a refunding issue, and that, under numerous decisions of our own courts and those of other jurisdictions, including the United States Supreme Court, costs incident to a suit at law partake of the same nature as the original debt, and since the State Board of Administration has succeeded to all the powers of Boards of County Commissioners with regard to such bonds as are being administered by you, I am of the opinion that the present Board may issue refunding bonds to cover all such items and secure the payment thereof by a pledge of the issuing unit's distributive share of Gasoline Tax Funds. Such being the case, I am of the further opinion that the Board may, within the spirit and intent of Section 16, Article IX of the Constitution, in its discretion, adopt and follow the more direct and convenient course of paying all such obligations direct or of refinancing them under the powers conferred by the Constitution, rather than the cumbersome, expensive, and somewhat circuitous process of refunding operations.

Please bear in mind that this opinion deals solely with judgments based upon bonds or obligations entitled to participate in the distribution of Gasoline Tax Funds. I am not here undertaking to decide as to the Board's powers and duties with reference to other claims against issuing units incident to such bond issues, such as, for instance, refunding expenses, fees and commissions incident to original or refunding bond issues.

January 8, 1943.—043-6.

RESCISSION OF CALL FOR BOND REDEMPTION—  
HAMILTON COUNTY

**QUESTION:** On July 7, 1942, exercising its option to do so, Hamilton County called for redemption, as of February 7, 1943, all of a certain outstanding bond issue aggregating \$98,000.00, but, on January 4, 1943, rescinded the call as to \$72,000.00, leaving \$26,000.00 subject thereto. There are on hand available funds to redeem the \$26,000.00, with interest.

Is the Board authorized to transmit to the paying agent funds necessary to redeem the \$26,000.00 of bonds?

*To the State Board of Administration:*

Under Section 16, Article IX of the Constitution, the powers of the Board of County Commissioners concerning the bonds in question, passed to the State Board of Administration on January 1, 1943. Therefore, the rescinding resolution of January 4, 1943, is a nullity, because of the total

lack of authority on the part of the Board of County Commissioners to adopt it.

The consequence is that the call evidenced by the resolution of January 7, 1942, stands unrescinded and binding, if at all, upon the State Board of Administration.

Such being the case, it becomes the imperative duty of the State Board of Administration to either meet the call of July 7, 1942, or to rescind it along the lines of the attempted resolution of January 4, 1943, by the Board of County Commissioners.

In my opinion of July 20, 1942, I stated that whatever damages resulted from that call and its subsequent rescission, was a matter between the injured bondholder and the county. The same situation prevails in the instant case, except that although the State Board of Administration takes the place of the Board of County Commissioners, it may not be subjected to an action at law for damages suffered by failure to consummate the call.

The most that the State Board of Administration may be compelled to do would be to meet the call in full if sufficient funds are on hand to the credit of the county and applicable to this bond issue.

My advice is that your Board do one of the following:

(a) Arrange to meet the call in full; (b) rescind the call, as the Board of County Commissioners vainly attempted to do, remit funds to redeem the \$26,000.00 of bonds, and await the consequences; (c) exercise its power to retire the issue with the proceeds of tax anticipation certificates, or (d) issue refunding bonds.

This is a matter which I think needs prompt attention, in view of the fact that the call was for next February 7th.

## CHAPTER XX

### CONSERVATION, ARCHEOLOGY AND GEOLOGY

#### FISH AND GAME, GENERALLY

September 19, 1944.—044-276.

##### LINES OF DEMARCATION

**QUESTION:** Does the Game and Fresh Water Fish Commission have authority to establish lines of demarcation between the fresh and salt waters in the various rivers and streams entering into the Gulf of Mexico on the west coast and the Atlantic Ocean on the east coast of Florida?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

It is my opinion that the Game and Fresh Water Fish Commission alone does not have the authority to establish lines such as those about which you inquire. However, your attention is directed to Section 371.01 (11), Florida Statutes, 1941, providing that "Fresh water", except where otherwise provided by law, includes all . . . , rivers, . . . , and other waterways of Florida," to a point defined thereby, "or to such point or points as may be fixed by the commission (Game and Fresh Water Fish) . . . , by and with the consent of the board of county commissioners of the county or counties to be affected . . ." (Emphasis supplied). It would seem that the exception in such section refers to those statutes relating to certain designated rivers and waterways of the State and specifically fixing the points in such rivers and waterways to which "fresh water" extends.

#### GAME AND FRESH WATER FISH

June 30, 1944.—044-181.

##### ALLIGATOR HIDES—DISPOSITION BY COURT

**QUESTION:** What disposition of alligator hides should be made by the Court where the defendant has been adjudged not guilty of the illegal possession of such hides?

*To Honorable R. M. Harris, County Judge, LaBelle, Florida:*

It appears that the verdict of not guilty of the charge of the illegal possession of alligator hides was, in effect, a decision by the jury that the defendant had legal possession of such hides. This, it seems, is tantamount to holding that since the defendant was in legal possession of the hides he should have been left in possession of such hides. Therefore, it looks as though your problem is the disposition of alligator hides which were in the legal possession of the defendant.

There is no statute of this state governing a situation of this character and the expression of our Supreme Court coming the nearest to shedding light on the problem is contained in *Hodges vs. Filstrup*, 114 So. 521. In that case one Meigs, a fish dealer, purchased and received possession of certain mullet, which were seized by a Deputy Shell Fish Commissioner, apparently on the assumption that they were purchased or possessed in violation of Section 2, Chapter 10123, Laws of Florida, 1925 (now Section 374.23, Florida Statutes, 1941). The Deputy Shell Fish Commissioner turned the mullet over to a Deputy Sheriff and, subsequently, at a

Sheriff's sale under the purported authority of Section 5829, Revised General Statutes, 1920 (now Section 374.41, Florida Statutes, 1941), they were purchased by one Filstrup. After the Sheriff's sale, deputies of the Shell Fish Commissioner attempted to take possession of the fish from Filstrup who filed a bill for an injunction to prevent the deputies from so doing.

On the aforesaid statement of facts the Court held that Meigs was not in violation of the statute first mentioned, and that he came into lawful possession of the mullet; that consequently the seizure of the fish by the Deputy Shell Fish Commissioner was without warrant of law and that since the sale by the Sheriff to Filstrup was not based on a valid seizure, such sale was also unlawful; moreover, that Filstrup did not, under the sale by the Sheriff, acquire any right either of title or possession which he could have enforced or protected by a Court of Equity.

Therefore, the jury having found that the defendant was in legal possession of the alligator hides, he should be entitled to the possession of such hides, and upon a proper application to the Court an order could be entered returning possession of the hides to him.

This opinion is based entirely upon that part of your question quoted above, and I trust that it contains the desired information.

September 12, 1944.—044-270.

#### CARRYING FIREARMS AFTER DARK

**QUESTION:** May the Game and Fresh Water Fish Commission promulgate a rule prohibiting the carrying of firearms after dark in the woods of Florida?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

After examining and considering the amendment to the Constitution of the State of Florida creating the Game and Fresh Water Fish Commission, together with the statutes of this state, it is my opinion that by the virtue of such amendment and Chapter 21945, Laws of Florida, 1943, the Commission may prohibit the carrying of firearms at any time of the day or night within the boundaries of the hatcheries, sanctuaries, refuges, reservations and other property owned or used for such purposes by the State of Florida, but that the Commission is not empowered to promulgate a rule prohibiting the carrying of firearms after dark in the woods situated outside of such boundaries or to promulgate such a rule on a state-wide basis.

July 28, 1944.—044-222.

#### CLOSED SEASON—BLACK BASS IN ST. JOHNS RIVER

**QUESTION:** 1. Does the Game and Fresh Water Fish Commission have authority to enforce closed season rules on black bass in that portion of the St. Johns River from the Volusia Bar, north?

2. If the answer is in the affirmative, what is the foundation therefor?

3. If there is doubt about the existence of such authority, what are the factors which create the doubt?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

After rendition by the Supreme Court of the opinion which I have been awaiting, to wit: in the case of *Sylvester vs. Tindall* (not yet reported), I am dividing my answer to your inquiry as follows:

1. I think the Commission does have jurisdiction over black bass in that portion of the St. Johns River north of the Volusia Bar, if black bass



are fresh water fish, because Section 30, Article IV of the State Constitution in Subparagraph 1 thereof provides:

"From and after January 1, 1943, the management . . . of . . . fresh water fish, of the State of Florida . . . shall be vested in" . . . your Commission.

2. The reason for the affirmative answer, provided black bass are fresh water fish, is that the Constitution seems to extend the jurisdiction of the Commission so as to cover fish that are fresh water fish and in the territorial waters of the State regardless of whether such waters are salt or fresh.

3. There is some doubt in my mind in giving you the above answer and this doubt is occasioned by the following questions:

a. Who is to say whether black bass are fresh or salt water fish?

b. Is a fish to be classified as a fresh or a salt water fish according to the waters which it inhabits at any particular time?

c. Can a fish be a fresh water fish when in fresh water and a salt water fish when in salt water or is it permanently one or the other?

If what I have said here presents any further legal question that needs elucidation, and we can be of help to you, please call on us.

September 23, 1944.—044-284.

#### COMMISSION—AUTHORITY TO STIPULATE VALUE OF LEASEHOLD

QUESTION: 1. Is the Game and Fresh Water Fish Commission authorized to stipulate, after the condemnation of a leasehold interest in property acquired by the Commission, to accept the amount of the Federal Government's appraisal as its compensation, thus waiving the necessity of a jury trial to find what award should be made for the taking?

2. Is such Commission empowered to receive the amount of the award?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

It is revealed by the records of the Game and Fresh Water Fish Commission that the property referred to was embraced within a game refuge controlled and managed by the Commission at the time the aforesaid condemnation suit was filed by the United States of America, under Title 40, Section 258a, USCA, for use in the establishment of a bombardment and gunnery range in connection with the Fort Myers, Florida, Army Air Field, a military airport of the United States Army. The control and management of all game refuges and all other property now or hereafter used for such purpose by the State of Florida are vested in the Commission by Article IV, Section 30, of the Constitution of the State of Florida.

After considering the foregoing, it is my opinion (1) that the Game and Fresh Water Fish Commission is authorized by law to stipulate with the United States Government that a jury trial be waived and that the market value of the leasehold be fixed in the amount of the appraisal of the Federal Government; and (2) that such Commission is entitled under the law to receive the funds that are now in the registry of the court.

November 5, 1943.—043-300.

#### COMMISSION—CONTROL OVER PRIVATE PONDS AND LAKES

QUESTION: Did the constitutional amendment recently adopted establishing the Game and Fresh Water Fish Commission vest control of fish in privately owned fish ponds and lakes in the Commission?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

I wish to advise that I do not believe that it was the intention of the people when they adopted this constitutional amendment to change the Common Law as it then existed, which seems to be that there can be no control exercised over privately owned, nonnavigable fish ponds and lakes that are maintained and known as such, where such fish ponds and lakes have no connection with outside waters to and from which the fish can pass and where the pond or lake is situated entirely upon property owned by the persons or corporations maintaining such fish ponds or lakes; see *C. J. - Fish* and *C. J. S.* under the same subject, also *Newman, etc., et al., vs. Ardmore Rod and Gun Club, et al.*, 125 Pac. 2d. 191.

November 4, 1943.—043-294.

#### COMMISSION—DETERMINATION OF NUMBER OF MEMBERS

QUESTION: Does the 1943 Law creating the Sixth Congressional District in Florida have any effect on the Game and Fresh Water Fish Commission insofar as the number of men making up the Commission is concerned?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

Section 30, Article IV, of the Constitution of the State of Florida, effective in January, 1943, definitely fixes the number of Commissioners at five persons and provides that one Commissioner is to be appointed from each Congressional District as existing on January 1, 1941. This constitutional provision contains a provision repealing all laws in conflict therewith which repeals the laws providing for a Statutory Board. The Congressional Districts as they existed on January 1, 1941, are the Conservation Districts at the present time. The fact that the Congressional Districts have been changed since that date does not authorize the appointment of additional Commissioners or a change in the Conservation Districts.

It is, therefore, my opinion that the Constitutional Game and Fresh Water Fish Commission is composed of only five persons, one from each of five Conservation Districts as defined by the Constitution.

March 21, 1944.—044-90.

#### COMMISSION—JURISDICTION OVER FISHING IN PHOSPHATE PITS

QUESTION: Did the Constitutional Amendment recently adopted establishing the Game and Fresh Water Fish Commission vest the Commission with control of fresh water fish found in the water-filled phosphate pits which are to be found in various sections of Florida?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

By Opinion of date November 5, 1943, I advised you that the constitutional amendment referred to did not vest the Commission with control of privately owned, nonnavigable fish ponds and lakes that are maintained and known as such, where such fish ponds and lakes have no connection with outside waters to and from which the fish can pass and where the pond or lake is situated entirely upon property owned by the persons maintaining such fish ponds or lakes.

If the phosphate pits to which you refer are not maintained and known as privately owned fish ponds or lakes, then the Commission is vested with jurisdiction to regulate fishing therein. If, however, the contrary is true, then my opinion above referred to is applicable to the present inquiry.

December 11, 1943.—043-324.

#### COMMISSION—POWER TO LEASE OIL INTERESTS

**QUESTION:** What is the authority of the Game and Fresh Water Fish Commission to execute leases for oil on lands vested in the Game and Fresh Water Fish Commission?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

No form of oil lease has been prepared and considered in connection with this opinion, but because of the possibility that such a lease will convey an interest in land, this opinion is predicated on the assumption that the lease you have reference to is to convey an interest in land, that is to say, is, in effect, a sale of a part of the land.

State property cannot be sold or disposed of except by authority granted by the Legislature, and the statutory provisions relating thereto must be strictly complied with (59 C. J. States, 280). The Commission you refer to is a Constitutional Board created by Section 30, Article IV, of the Constitution of the State of Florida. In Section 1 of this amendment it was provided:

"The acquisition, establishment, control and management, of hatcheries, sanctuaries, refuges, reservations, and all other property now or hereafter owned or used for such purposes by the State of Florida, shall be vested in a Commission to be known as the Game and Fresh Water Fish Commission."

It is therefore my opinion, that the above quoted section of the Constitution vests the Game and Fresh Water Fish Commission with broad powers of management and control of such lands, but does not grant power to sell any interest in the lands. The power to sell these lands remains in the Legislature which has not authorized the Commission to sell lands by executing a so-called oil lease.

November 24, 1943.—043-315.

#### COURT COSTS—CONVICTION FOR VIOLATION OF LAWS

**QUESTION:** Does a County Judge have the right to remit the costs in any case on conviction of the violation of hunting, fishing or trapping laws?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

Section 372.71, Florida Statutes, 1941, provides, in part:

"All moneys collected from fines, penalties or forfeitures under this chapter shall go into the fine and forfeiture fund of the county where such convictions are had. The Commission of Game and Fresh Water Fish and its conservation officers shall be allowed for making arrests the same fees as sheriffs, and the same mileage for conveying prisoners, the same to be taxed as costs in the case, in case of conviction, and paid in like manner as the compensation of sheriffs, but no fees or mileage shall be allowed in case of acquittal, . . ."

It is my opinion that this section of the statute was not repealed by Section 30, Article IV, of the Constitution, which provided for a constitutional Game and Fresh Water Fish Commission and repealed all laws in conflict therewith, as it does not conflict with or encroach upon powers granted such Board.

Therefore, in case of conviction for violation of the Game and Fresh Water Fish Laws not repealed by the Constitutional Amendment, and for violation of the rules and regulations adopted by the Commission, the violation of which is made a misdemeanor by statute, the Court

shall, in the judgment, tax the costs as provided in the above section. This is mandatory, as the statute specifically provides for costs in case of conviction, and in such cases Section 939.01 applies, making it mandatory for the costs to be included and entered up in the judgment rendered against a convicted person.

Judgment once rendered by the Court, it is my opinion that the Court has no power to remit fine or costs, this power under Sections 11 and 12 of Article IV of the Constitution of the State of Florida, being vested exclusively in the Governor and the Pardon Board. (See *Singleton vs. State*, 21 So. 21).

It is therefore my opinion that in case of conviction for violation of Game and Fresh Water Fish Laws or Rules and Regulations, and on entry of judgment thereon, costs shall be taxed against the defendant as provided in Section 372.79 Florida Statutes, 1941. (See *Lindsey vs. Dykes*, 175 So. 793), and the Court has no power to remit such costs.

### BOARD OF CONSERVATION

March 23, 1943.—043-80.

#### ARRESTS BY GAME WARDENS

**QUESTION:** Where a Game Warden makes an arrest of four men in one party forty-five miles from the county seat of a county, and releases the men on their own recognizance, what mileage, if any, is assessable as costs to the Sheriff upon a plea of guilty of the men arrested?

*To Honorable Spessard L. Holland, Governor:*

I can find no law which authorizes the Sheriff to claim the costs when an arrest is made by a Game Warden (Conservation Officer). The law is rather specific in that regard. It is Section 372.72, Florida Statutes, 1941, which provides:

"... The commission of game and fresh water fish and its conservation officers shall be allowed for making arrests the same fees as sheriffs, and the same mileage for conveying prisoners, the same to be taxed as costs in the cause, in case of conviction, and paid in the like manner as the compensation of sheriffs, but no fees or mileage shall be allowed in case of acquittal. All mileage and other fees received by the commission of game and fresh water fish, or any of its conservation officers under this section, shall be deposited in the state treasury to the credit of the state game fund."

It is clearly apparent from this section that where the arrest is made by the Conservation Officer (Game Warden) that all mileage and other fees not only do not go to the officer making the arrest but under specific provision of the statute are deposited in the State Treasury to the credit of the Game Fund if any mileage and fees are received.

In view of Section 30.27, which provides that,

"No sheriff, constable or coroner shall charge constructive mileage. The mileage charged for must be actually traveled by the nearest and most direct route by the public highway."

I am of the opinion that any charge that the Sheriff might attempt to make would be constructive mileage because he did not actually travel the same, and, therefore, under either statute the Sheriff would not be entitled to any mileage.

In this instance where the men were released on their own recognizance and were not taken to the county seat, I am of the opinion that it would be improper for any mileage to be charged except one mileage to be charged by the officer making the arrest for the distance to and from the county seat.



September 16, 1944.—044-263.

**AUTHORITY TO DECLARE CLOSED PERIOD FOR TAKING  
CRAWFISH**

**QUESTION:** If an unsupported statement is made, in the statutory open season, to the State Board of Conservation, that the salt water crawfish in the waters of Florida are being depleted, does the Board have the authority to declare a closed period during which such crawfish cannot be taken while corrective measures are being initiated?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

A consideration of the various statutes having to do with the regulatory powers of the State Board of Conservation along with the provisions of Section 374.10, Florida Statutes, 1941, establishing a closed season on salt water crawfish, leads me to the conclusion that there is doubt as to whether the Board has any authority to declare a closed period at variance with the closed season fixed by statute.

It is my opinion that even if the Board does have such authority, it cannot declare a closed period until it has complied with the anterior requirements set forth in Section 373.06 of the aforesaid statutes.

January 5, 1944.—044-16.

**SALT WATER FISH TAKEN BEYOND TERRITORIAL LIMITS**

**QUESTION:** May salt water fish, taken with a purse seine beyond territorial limits of the State, be brought into Florida for processing and shipment?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

It is universally held that statutes regulating possession, transportation or sale within the State of fish or game taken outside of the State are valid as a proper exercise of the police power and are not unconstitutional as an interference with foreign or interstate commerce. *Johnson v. Gentry* (Cal.), 30 P. (2d) 400, 92 ALR 1264; *White v. State*, 113 So. 94; *New York ex rel. Silz v. Hesterberg*, 53 L. ed. 75, 22 Am. Jur. (Fish and Fisheries) #50.

Statutes regarding the possession, transportation or sale within a state of fish can have no application to fish taken outside or beyond the territorial limits of such state unless made so by express language, *Taylor v. Penton*, 128 So. 499; *Welles v. Penton*, 128 So. 500; *People v. Buffalo Fish Co.*, 164 N. Y. 93, 52 LRA 803; *Tyler v. State*, 93 Md. 309, 52 LRA 100.

The general laws of this state prohibiting sale, possession or shipment of fish taken by means of certain nets or during certain seasons or other prohibitions made for protection of fish under the police power, do not expressly prohibit sale, possession or shipment of fish brought into this state, taken beyond the territorial limits of the State, *Taylor v. Penton*, *Welles v. Penton*, *supra*. The Supreme Court of this state has held that such statutes are penal in nature and are strictly construed and punish only those acts which are specifically condemned. *Taylor v. Penton*, *supra*.

It is my opinion that the general laws of this state do not prohibit the taking of food fish beyond the territorial limits of the State by use of a purse seine or the bringing into the State of such fish for processing for shipment in interstate commerce. Any abuse of this right or exercise of same resulting in discriminations as to local fish supplies or practices can be corrected by legislation or regulatory rule of the Commission.

I have made no examination of special acts or acts of local application in passing on this question. An examination of such acts in particular localities may reveal specific prohibition which may change the rule in the area covered by the Act.

## SALT WATER FISHERIES

May 8, 1944.—044-144. See also 044-271.

## BOARD OF CONSERVATION—SPONGES

QUESTION: 1. May sponges be taken with diving equipment in any of the waters within the territorial limits of the State?

2. May sponges of a diameter less than five inches, that are taken outside the territorial limits of the State, be brought into the State and handled through the regular commercial channels?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

The first question posed by you is answered in the negative. See Section 374.27, Florida Statutes, 1941.

The second question posed by you requires an interpretation of Section 374.29, Florida Statutes, 1941. In part, this section provides:

"No person may take, by any means or method from the waters of the Gulf of Mexico, the straits of this state, or other waters within the territorial limits of this state, any commercial sponges measuring, when wet, less than five inches in their maximum diameter; and no person may land, deliver, cure, offer for sale or have possession of, at any port or place or upon any boat or vessel, any such commercial sponges. The presence of sponges of the diameter of less than five inches on any vessel or boat engaged in sponging in the waters of the Gulf of Mexico, the straits of this state or other waters within the territorial limits of this state, or the possession of any sponges less than said diameter sold and delivered by such person, shall be prima facie evidence of the violation of this section." (Emphasis supplied).

This section is penal in nature and must be strictly construed. The provisions thereof can only apply to those acts therein specifically condemned.

This question is related to the one discussed in my opinion to you of date January 5, 1944, wherein I advised that:

"Statutes regarding the possession, transportation or sale within a State of fish can have no application to fish taken outside or beyond the territorial limits of such State unless made so by express language, *Taylor v. Penton*, 128 So. 499; *Welles v. Penton*, 128 So. 500; *People v. Buffalo Fish Co.*, 164 N. Y. 93; 52 LRA 803; *Tyler v. State*, 93 Md. 309, 52 LRA 100."

It is my opinion that the words "any such commercial sponges" refer to those sponges described in said section that are taken within the territorial waters of this state. The provisions of said section do not prohibit one from taking sponges of any size beyond the territorial limits of Florida, and bringing the same into this state for use or sale.

I call your attention to this fact. Under the provisions of Section 374.29, the presence of commercial sponges of a size therein described on a boat engaged in sponging in the waters therein designated, or the possession of such a sponge that has been sold and delivered by one engaged in the business of sponging, shall be prima facie evidence of the violation of said section. Such evidence would be sufficient upon which to predicate a prosecution in the courts of this state, and upon the State having established such facts, the burden would then rest with the defendant to establish that the sponges in question were taken beyond the territorial limits of this state. If the defendant does establish such defense, he will have thereby invited prosecution in the Courts of the United States for having violated the provisions of Section 781, Title 16, U. S. C. A. Section 781 provides:

"It is unlawful for any citizen of the United States, or person owing duty of obedience to the laws of the United States, or any boat or vessel of the United States, or person belonging to or on any such boat or vessel, to take or catch, by any means or method, in the waters of the Gulf of Mexico or the Straits of Florida outside of State territorial limits, any commercial sponges measuring when wet less than five inches in their maximum diameter, or for any person or vessel to land, deliver, cure, offer for sale, or have in possession at any port or place in the United States, or on any boat or vessel of the United States, any such commercial sponges."

When a trial for the violation of Section 374.29 results in acquittal of a defendant whose defense is that the sponges in question were taken beyond the territorial limits of Florida, you may call the case to the attention of the United States District Attorney of the district wherein the crime was committed, so that such officer may institute criminal prosecution for the violation of said Section 781.

April 20, 1944.—044-129.

#### FORCE TRAP NETS

**QUESTION:** What constitutes an illegal operation of a so-called force trap net?

*To Honorable Spessard L. Holland, Governor:*

Chapter 18676, Special Act of 1937, provides:

"1. It shall be unlawful for any person, persons, firm or corporation to fish, or cause to be fished, any haul seine or drag net in any of the inside salt waters in Martin County, Florida." (Emphasis supplied).

This is the pertinent part of the Act in question.

The above statute was construed by our Supreme Court in the case of *Commercial Fishermen's Association vs. Christensen*, 10 So. 2d. 323, where the Court held in effect, that nets such as cast nets, trammel nets, gill nets and the so-called "force trap net" described therein did not come within the prohibition of the statute as long as they were not converted into and used as seines or drag nets.

The force trap net was described carefully in the case, and the manner of proper use was indicated which included "being clear of the bottom at all times and at no time touching the bottom while being moved through the water."

The Court further said that the net was intended to be used with its lead line floating high off the bottom, but if it was converted to the use and purpose of a haul seine or drag net there was nothing in their judgment intended to preclude prosecution.

The Circuit Court, pursuant to the above cited opinion, entered a qualified injunction in the said injunction suit appealed from in Leon County. In 1943, a petition for contempt and rule issued directed to certain agents of the Department of Conservation and others requiring them to appear and answer a contempt charge for alleged violation of the injunction. Motion to quash the rule was filed and argued on the proposition that the defendants should be expressly charged under circumstances declaring that the so-called force trap net was being used with the lead lines at all times being free and clear of the bottom. The Circuit Judge in entering his order to quash the writ and allowing time to file a new petition, recognized this as the law. The petitioners did not proceed and this matter has been dismissed with prejudice.

In the light of these proceedings, it is my opinion that:

1. A force trap net is a prima facie legal net and may be used in the inside salt waters of Martin County under Chapter 18676, Laws of Florida, Acts of 1937, when constructed and used as provided by the Christensen case, supra, except at those places in such waters where all netting is expressly prohibited, which question is not considered here.

2. That a force trap net is designed to be used as a trap in deep water with its lead line always free and clear from the bottom.

3. That the use of such a net in shallow water by allowing the lead lines to sweep along the bottom constitutes a conversion into and use as a drag seine and haul net and comes within the prohibitions of said Act.

October 19, 1943.—043-275.

#### ILLEGAL EQUIPMENT—SEIZURE AND DISPOSITION

QUESTION: What procedure should be followed by the State Board of Conservation after seizure of nets and fishing equipment illegally used in salt waters?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

I suggest the following:

1. Someone who has knowledge of the facts concerning the violation could appear before a committing magistrate (Justice of the Peace, or Judge of the Circuit Court, County Judge's Court, County Court, or Criminal Court of Record), having jurisdiction over the area within which the crime was committed, and take proper proceedings to have a warrant issued and served by the Executive Officer of the Court.

2. In those counties, where the offense is committed, having County Courts or Criminal Courts of Record, the Prosecuting Attorney would have authority to file an information, or in counties having a County Judge's Court the matter might be tried on an affidavit filed before the Court, and such proceedings being taken, the necessity of proceeding before a committing magistrate (preliminary hearing, etc.) might be dispensed with.

3. In case the proceedings before a committing magistrate resulted in a discharge, trial of the person charged with the offense might still be had on an information or affidavit as the case may be.

4. Evidence obtained by agents of the Department should be delivered to the Sheriff of the county in which the offense was committed and receipt should be taken therefor. The Sheriff is the Executive Officer of the Courts and as such is the proper officer to hold evidence pending trial. (See Sections 26.49, 34.07, 36.11, 32.26 and 37.16, Florida Statutes, 1941).

You advise that some difficulty has been experienced from loss of evidence because of replevin suits being filed against Sheriffs to retake property, and no contest being offered in some of these cases. I suggest that you immediately obtain executive authorization from the Governor to advise all Sheriffs that it is the Governor's instruction in case replevin suits are begun to recover any evidence deposited with them by the agents of your Department, that they immediately notify you and that such evidence be held in their possession subject to your instructions and court order.

It is my opinion that such action to recover such evidence from Sheriffs is improper and this office will resist any attempt to obtain possession of such evidence by that method.



December 14, 1943.—043-330.

### MULLET—CLOSED SEASON—SEIZURE AND DISPOSITION

**QUESTION:** A carload of fresh mullet shipped from a closed county on December 5th arriving in Jacksonville on the 6th, and unloaded on the 7th and 8th, has been seized and put in storage in Jacksonville by a Conservation Agent. What procedure should be followed in disposing of the seized carload of mullet?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

A number of statutes may be involved in this seizure, and I call your attention to Section 374.23, Florida Statutes, 1941, providing for closed season on mullet. This statute was construed in the case of *Hodges vs. Filstrup*, 114 So. 521, in which case it was held that:

Mullet in the lawful possession of a dealer is not subject to seizure until midnight of December 6. The statute has not been changed since the above decision, and assuming the mullet was caught during the open season, then it was not subject to seizure until after midnight December 6, 1943. The same case is also authority for the proposition that Section 5829, RGS 1920, now Section 374.41, Florida Statutes, 1941, does not authorize forfeiture where no seizure of a boat is involved, the sale of the fish being incidental to the procedure provided for sale of the vessel.

The above statute must be read in connection with Chapter 20923, Laws of Florida, 1941, and Section 373.26, Florida Statutes, 1941, providing for the sale of frozen fish on hand prior to the commencement of the closed season, requiring the owner to make certain reports to the State Board of Conservation and providing a penalty for violation of the law. Although Section 374.23 provides only 5 days for disposal of mullet caught during the open season, Section 373.26 authorizes sale of frozen stocks. I assume this statute is not applicable in this particular case as you use the term "fresh fish."

There is no statute in this state providing for the summary disposal of "fresh salt water fish" seized for violation of Section 374.23, except as incidental to the sale of a seized vessel, and the right of disposal as to such fish after seizure depends therefore on the Common Law. The fish themselves are illegal property rather than an instrumentality by which an illegal act is done; therefore these fish fall into that class of goods ordinarily represented by liquor and slot machines rather than that class represented by vehicles used for transporting illegal goods, and as such these fish are subject to being disposed of by the Court as an incident to the criminal charge. However, they are highly perishable and should not be held to await the judgment.

It is my opinion that if these fresh fish were properly seized after midnight December 6, 1943, they are lawfully held by the State, and that the owner should be charged with violation of Section 374.23, Florida Statutes, 1941. In these times of food shortages the fish should be disposed of immediately and I recommend one of two methods:

1. By returning the fish to the owner, retaining a sufficient amount for evidence. The owner may then dispose of the fish under Section 373.26, Florida Statutes, 1941.
2. By immediately applying to the Court for an order to dispose of the fish pending determination of the criminal charge and rights of the owner in the fish. By all means, the owner should have notice and right to be heard on such petition.

This opinion is not in conflict with, nor does it overrule my opinion sent you dated December 31, 1941, on the right to confiscate fish *illegally* taken from waters of the State. That opinion was predicated on the theory that title never passed from the State. In this opinion it is assumed that the salt water fish were lawfully obtained in the first instance.

November 14, 1944.—044-319.

**MULLET—TAKING OUT OF SEASON FOR USE IN WAR EFFORT**

**QUESTION:** Does the State Board of Conservation have authority to permit the taking of mullet during the statutory closed season, so that a privately owned plant situated at Ft. Myers, Lee County, Florida, may fulfill its contract with a corporation of the United States Government, to furnish dehydrated fish for the use of soldiers hospitalized overseas?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

Section 374.23, Florida Statutes, 1941, provides that:

"No person may take . . . any fresh . . . mullet . . . in this state, between the first day of December of any year and the twentieth day of January of the next succeeding year."

while Section 373.06 of such statutes reads as follows:

"The state board of conservation shall gather data concerning the commercial fisheries, making such investigations of the various species of fish, and prepare the same biennially to show the abundance of the important commercial fish and guide in the collection and preparation of statistical information necessary to determine evidence of overfishing. Said board is authorized and directed, from time to time, having due regard to distribution, abundance, economic value and breeding habits, to determine when, to what extent, if at all, and by what means it is compatible with the safeguarding of the supply to allow . . . taking, capturing, possession, sale, purchase, shipment, . . . of salt water fish . . . or parts thereof and to adopt suitable regulations permitting and governing the same in accordance with such determinations."

It is my belief that if the Board first conducts an inquiry in accordance with the standards prescribed by the last mentioned section and as a consequence finds that due to the present World War an emergency exists, making it necessary as a part of the war effort of our nation and as a contribution to the cause of the United Nations that such contract be fulfilled, that this cannot be accomplished except through the use of mullet and that sufficient mullet cannot be obtained to satisfy the requirements of the contract without taking them from the waters of this state during the closed season, the Board is empowered solely as an emergency measure to permit the taking of mullet from such waters for that purpose and that purpose alone.

I am of the opinion that any regulation which is adopted in the specific instance to which the Board's inquiry applies, should provide that the taking of mullet shall be confined to the waters of this state situated within Lee County, that such mullet can be taken solely for the purpose of supplying the plant in question, that the mullet can be taken for a limited, defined period and that only a sufficient amount of mullet can be taken to meet the requirements of the contract.

It is understood that the aforesaid construction of Section 373.06 is predicated entirely upon the situation reflected by the question and the existence of a war emergency and that it does not abrogate the general rule that the Board is without authority to limit the closed season on mullet as expressed in Section 374.23.

As the question posed above reflects the situation prompting the request for opinion in your letter of November 8, this opinion may be considered as an answer to such request.

July 8, 1944.—044-202.

**SEAFOOD DEALERS—ADDITIONAL LICENSE TAX**

**QUESTION:** Does the state license tax on wholesale seafood dealers prevent cities or counties from collecting additional taxes?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

Section 2, Chapter 19611, Laws of Florida, 1939, required wholesale seafood dealers to pay an annual license tax to the State "in lieu of any other tax or taxes now imposed by law on wholesale fish dealers." Section 374.30, Florida Statutes, 1941, the law presently governing the license tax on seafood dealers, is a revision of the above mentioned chapter, and the words last quoted were omitted therefrom. The pertinent provisions of said section read as follows:

**"License: seafood dealers and non-resident fishermen; penalty**  
—Seafood dealers, and aliens and non-residents who take salt water fish other than for personal use, as a condition precedent to doing business or fishing in Florida, shall procure from the supervisor of conservation a license, the same to be issued by the said supervisor upon proper application made on forms to be furnished by said supervisor. . . . The annual license tax for the above licenses shall be as follows:

- (1) Wholesale seafood dealers, fifty dollars.
- (2) Wholesale seafood dealers, who are aliens, five hundred dollars."

In addition to the annual license tax provided by the aforesaid section, the legislature has authorized cities and counties of the State of Florida to assess and impose taxes pursuant to and in accordance with the provisions of certain applicable statutes which are Sections 205.01, 205.02, 193.11, 193.32 and 167.43, Florida Statutes, 1941, and in the case of those municipalities chartered by special acts of the legislature, the special acts by which said municipalities are created.

September 13, 1944.—044-271. See also 044-144.

#### UNDERSIZED SPONGES

**QUESTION:** Can the State make out a case for the possession of commercial sponges less than five inches in maximum diameter, when it is unable to prove where such sponges were taken?

*To Honorable Chester McMullen, State Attorney, Clearwater, Florida:*

After carefully considering Section 374.29, Florida Statutes, 1941, which prohibits the taking and possession of undersized commercial sponges from the waters within the territorial limits of this state, and particularly that part of such section having to do with prima facie evidence of a violation thereof, it is my opinion that even when it is unable to prove where the sponges were taken, the State can make out a case when it can prove that they were present on a boat engaged in sponging in such waters. This would necessitate finding the sponges on a boat while it was so engaged.

It is my belief that in all other cases the State would have to prove that the sponges were taken in waters within the territorial limits of the State. To this extent I am modifying my opinion of May 8, 1944 addressed to Honorable S. E. Rice, Supervisor, State Board of Conservation.

#### SHELL FISH

August 21, 1944.—044-248.

#### POWER OF BOARD TO EXTEND OPEN SEASON

**QUESTION:** Does the State Board of Conservation have the power to advance the opening date of the oyster season from October 1 to September 1?

*To Honorable S. E. Rice, Supervisor, State Board of Conservation:*

Section 375.15, Florida Statutes, 1941, which came into being as Section 20, Chapter 6532, Laws of Florida, 1913, provides that "No person may take . . . oysters between the fifteenth day of April and the first day of October of each year." Consequently, the question resolves itself into one of whether the Board has the authority to advance the opening date from a date fixed by law.

A review of the sections of the Florida Statutes, 1941, relating to the regulatory powers of the Board, discloses that the only section which might be considered as granting such authority is Section 373.06, whereby the Board is empowered to adopt "suitable regulations permitting and governing" the "taking" of oysters "in accordance with" its "determination." However, this section had its origin in Section 10, Chapter 16178, Laws of Florida, 1933, which contained a provision that nothing therein should "operate to repeal or supersede any existing law concerning the taking . . . of . . . oysters"; and the above mentioned Section 20 was an "existing law."

It seems clear from the provision last quoted and from the inclusion of the aforesaid Section 20 in the Florida Statutes, 1941, that the Legislature intended to, and has, fixed the first day of October of each year as the lawful opening date of the oyster season, and that the Legislature did not intend to vest, and has not vested the Board with the power to advance the opening date so designated and established.

Based upon the foregoing, it is my opinion that your question must be answered in the negative.



## CHAPTER XXI

### PUBLIC HEALTH

#### STATE BOARD OF HEALTH

March 19, 1943.—043-79.

#### ANTI-RABIES CAMPAIGN

**QUESTION:** Has the State Board of Health authority to inaugurate an anti-rabies campaign and order that all dogs on the highways or streets of the State be killed, when such dogs are not on a leash or in the care of someone?

*To Honorable Spessard L. Holland, Governor:*

You call my attention to Section 381.17, Florida Statutes, 1941, which purports to give the State Board of Health the power to quarantine persons and animals and I think that it is on this particular statute that the State Board of Health is basing this campaign.

You also call my attention to Sections 811.19, 811.09, 767.02 and 767.03. I have carefully examined all of these sections.

Section 381.17 seems to me to authorize the State Board of Health under certain circumstances to quarantine dogs and to

"... place any and all such restrictions upon ingress and egress of animals or persons thereat as, in his judgment, shall be necessary to prevent a spread of the disease from the infected locality or animal or animals; and the state health officer, when he shall have declared any city, town or other place, or animals to be in quarantine, shall so control the population or animals of said city, town or other place, and make such disposition of the same as shall in his judgment appear best to protect that population and at the same time prevent a spread of the infection, or running at large of animals infected with rabies, among the same. . . ."

This section also authorizes the President of the State Board of Health to call to his assistance the peace officers of the State. You will note there is no specific authority whatsoever vested in the Board of Health or the President thereof to shoot all dogs merely because they happened to be running at large. He is apparently authorized to order all dogs to be quarantined and to provide further that no dog shall be allowed on the streets or highways of the State unless the dog is on a leash or in the care of some person. The penalty for disobeying any quarantine regulations is fixed by Section 381.20, which provides:

"Whoever violates, disobeys, omits, neglects or refuses to comply with any quarantine regulations which may be established by the state health officer, or any of the rules and regulations which may be duly promulgated by said state health officer or said state board of health, shall be punished by imprisonment not exceeding six months, or by fine not exceeding one thousand dollars."

You will note that this section provides punishment of the violator of any quarantine or regulation either by imprisonment or by fine and does not authorize the Health Officer or any of his agents to destroy a dog just because he happens to be running at large upon the public highways and streets of our state. It seems to me that the penalty for the violation of any quarantine regulation is severe enough to deter any-

one from violating the provisions and this, as the law is now written, seems to be the only method of enforcing a quarantine or any regulations promulgated by the Board of Health.

Section 811.09 relates to carrying away beasts or birds. I don't think that this section is sufficiently applicable to consider. However, Section 811.19 relates to the larceny of, and injury to, dogs, and in addition to this provides:

"All dogs owned and domiciled within this state are declared to be domestic animals, and ownership of and property rights therein shall exist and be asserted and protected in the same manner and under the same conditions as ownership and property rights in other domestic animals."

I think that if dogs had not been property within the meaning of the law prior to the passage of this statute they certainly are now and must be dealt with as such. In view of this statute it certainly could not be contended that a dog is the property of no one and can be shot on sight by any police officer.

Section 767.02 relates to sheep-killing dogs and provides that it shall be unlawful "for any dog known to have killed sheep to roam about over the country unattended by a keeper. Any such dog found roaming over the country unattended shall be deemed a run-about dog, and it is lawful to kill such a dog." You will note that in this instance the Legislature has specifically provided under what circumstances a sheep-killing dog can be killed, but even under this statute whoever kills this dog certainly must possess some evidence that the particular dog has killed sheep and it does not justify killing any dog that roams at large.

Section 767.03 provides for a defense for killing such dog. It reads:

"In any action for damages or of a criminal prosecution against any person for killing or injuring a dog, satisfactory proof that said dog had been or was killing sheep shall constitute a good defense to either of such actions."

It is, therefore, plain from these two sections of our statute that even in communities where dogs have been known to kill sheep you must be possessed with evidence that a particular dog was a sheep-killing dog before you could have a good defense if you shot a dog roaming upon the public highways and streets or over the county. Therefore, it seems to me that when the Legislature intends that dogs may be killed it has specifically provided under what conditions this may be done.

I do not mean to intimate that any police officer could not shoot a dog that was roaming about in the city or county if he knew such dog had rabies or was vicious and was attempting to bite someone, but from my examination of the applicable law I am of the opinion that it would be unwise for a Sheriff to shoot all dogs on the highways and streets, when said dogs were not on a leash or in the care of someone, without having more reason for so doing than just the fact that these dogs were on the streets and highways of the State and were not on a leash or in the care of some person.

I, therefore, answer your question in the negative.

If the State Board of Health feels that the law as now written, which gives them the right to arrest anyone who would violate a quarantine regulation by allowing a dog to roam about the streets unattended and not upon a leash is not sufficient to adequately enforce its quarantine measures, then it can appeal to the Legislature which meets, as you know, in the next few days, for a more stringent law.

January 7, 1943.—043-5.

#### AUTOMOBILES—PURCHASE FOR USE OF QUARANTINE HOSPITALS

**QUESTION:** May the State Board of Health lawfully purchase such automobiles as may be necessary in the operation of State Board of Health Venereal Disease Quarantine Hospitals and pay for said automobiles from United States Public Health Service funds allotted to Florida for venereal disease work?

*To the State Board of Health, Jacksonville, Florida:*

Congress has appropriated large sums of money for the purpose of assisting states, counties, health districts, and other political subdivisions of the states in establishing and maintaining adequate measures for the prevention, treatment and control of the venereal diseases (Title 42, Section 25a, U. S. C. A.).

Out of the foregoing appropriations the Surgeon General of the Public Health Service determines the sums to be allotted to the several states upon the basis of (1) population, (2) the extent of the venereal disease problem, and (3) the financial needs of the respective states (Title 42, Section 25b, U. S. C. A.).

The money so allotted and paid to the states under the foregoing section is required to be expended in carrying out the purposes specified in Section 25a, Title 42, supra, and in accordance with plans presented by the Health Authority of such state and approved by the Surgeon General of the Public Health Service (Title 42, Section 25c, U. S. C. A.).

The General Appropriation Bill of Florida for the years 1941 and 1942, in Section 6 thereof, provides that federal money appropriated by the Congress of the United States to be used for state purposes, whether by itself or in conjunction with moneys appropriated by the Legislature of the State, is reappropriated as far as it may be necessary to the purpose for which same was made available, and insofar as the same is permitted by the Federal Statutes. (Chapter 20980, Section 6, Laws of Florida, 1941).

It appears, therefore, that while such funds are allotted to the various states, the expenditure thereof is for a purpose specified by the Federal Congress, and is not governed nor circumscribed by State Law but by Federal Law and Federal Authorities pursuant thereto. Under the terms of the Federal Statute it seems clear that the State Legislature would be without authority to extend the purposes for which such appropriations might be expended. By the same token, it is just as true, in my opinion, that the State Legislature could not restrict nor in any way circumscribe the expenditure of such funds.

Therefore, it is my opinion that the State Board of Health may purchase such automobiles as may be necessary in the operation of State Board of Health Venereal Disease Quarantine Hospitals, and pay for the same from United States Public Health Service Funds allotted to the State of Florida for the control of venereal disease, provided such expenditure is in accordance with plans presented by the State Board of Health and approved by the Surgeon General of the United States Public Health Service. If such expenditure was not anticipated at the time the current plan was prepared and approved by the Surgeon General, then the expenditures for the automobiles in question should be specifically approved at this time by the Surgeon General, and the Comptroller of the State of Florida should be furnished proof of such approval upon which authority he may lawfully honor warrants in payment of the purchase price of said automobiles.

March 2, 1943.—043-61.

#### DEFENSE DOCTORS—REGISTRATION

**QUESTION:** Where the State Defense Council, acting in cooperation with the United States Public Health Service, causes doctors, commissioned and employed by the said United States Public Health Service, to be brought into this state and stationed in areas where there are no local practicing doctors or where the local practicing doctors are greatly inadequate, for the purpose of rendering needed and necessary medical services within these areas; should such persons be registered as doctors with the Florida State Board of Health?

*To the State Board of Health, Jacksonville, Florida:*

We have been informed that doctors brought into this state by the State Defense Council, the State Board of Health and the United States Public Health Service for the purposes aforesaid and in accordance with that certain resolution of the State Defense Council of September 24, 1942, are employees of the United States Public Health Service and are commissioned as officers of and are paid by the said United States Public Health Service. Although a small charge for services of the doctor is made, the physician in question receives no part thereof. His compensation is paid entirely by the Federal Government. An office is maintained for him by or under the authority of the State Defense Council. Supplies are purchased and a nurse or other assistant is employed to assist the doctor; and for the purpose of defraying these expenses a small charge is made for the services performed by the doctor. The doctor is in reality practicing under the authority of the United States Public Health Service and not pursuant to any law of this state. Any certificate or license issued to such doctor by the State Defense Council through any agent of the Defense Council can have no value other than for identification purposes.

We are, therefore, of the opinion that doctors employed, paid and commissioned or licensed by the United States Public Health Service, who are brought into this state by the State Defense Council in cooperation with the United States Public Health Service, as aforesaid, need not, and should not, be registered as doctors with the State Board of Health, unless and until they have been admitted to practice their profession under the laws of this state by such Medical Board as may have jurisdiction in their case.

January 11, 1943.—043-9.

#### EMPLOYEES—COMMISSIONING AS NOTARIES PUBLIC

**QUESTION:** May the State Board of Health pay the costs for having certain of its employees commissioned as Notaries Public?

*To the State Board of Health, Jacksonville, Florida:*

Notaries Public under our laws are public officers, commissioned as such, and must pay their own commission fees.

Where a state employee is required by the department which employs him to be commissioned as a Notary Public, such Notary Public may bill the department for which the notarial services are performed, for such services, which may properly be considered as part of the Necessary and Regular Expenses of said department.

With reference to your particular problems, sworn statements by physicians and pharmacists under the narcotic law are properly expenses of the individual physicians and pharmacists, and may not be charged to the department. However, notarial services in taking sworn statements of witnesses called by the Director of the Bureau of Narcotics or his



deputies in cases of infractions of law, are properly chargeable to the department.

Notarial services for applicants for birth certificates are the expense of the individual applicant and not of the Bureau of Vital Statistics.

Notarial services in connection with preparation and authentication of expense accounts or vouchers are expenses of the individual employee and cannot be reimbursed as part of the expense of the department.

Notarial services in connection with reports by the State Health Officer or other department heads or deputies, other than expense statements or vouchers required to be thus authenticated, are proper charges against the Necessary and Regular Appropriation of the department.

No doubt your notarial services which may properly be charged against your various departments will greatly exceed the cost of commissioning the necessary Notaries Public. Therefore, it might be advisable to agree with the Notary Public on a lump sum to be charged for such notarial services, in an amount sufficient to cover the cost of commissions, etc., and then draw on your Necessary and Regular Appropriation in payment thereof.

May 31, 1943.—043-125.

#### LABELING OF MILK

**QUESTION:** Can the Board of Health legally abandon its grade labeling policy with reference to milk and cream during the emergency, and permit the labeling of milk either as "Ungraded Milk," or simply "Pasteurized Milk," or "Raw Milk"?

*To the State Board of Health, Jacksonville, Florida:*

The statutes of this state require that all milk and cream shall, when sold in bottles or other receptacle to consumers or to dealers for resale to consumers, be plainly and conspicuously labeled in such manner as may be prescribed by the Commissioner of Agriculture, to show the grade under which it is sold and the source of production of same, indicating the name of the state in which the milk or cream was produced.

The statutes likewise provide that every person who ships or sells milk or cream produced in the State of Florida or brought from points outside the State, shall cause the same to be labeled or identified in such manner as may be prescribed by the Commissioner of Agriculture, as will advise the purchaser or consumer of the nature and kind of milk or cream, and will indicate the state in which same was produced. Examples of labeling given in the statute are as follows:

Buttermilk, if churned, shall be labeled "Churned Buttermilk";  
Cultured Buttermilk should be labeled "Cultured Buttermilk";  
Renovated Butter shall be labeled "Renovated Butter"; etc.

The statutes make no reference to different grades of milk, such as "Grade A," "Grade B," or the like.

The Sanitary Code, which is adopted by the Florida State Board of Health pursuant to statute, does define different grades of milk. The Sanitary Code, however, under statute may be amended from time to time.

It is my opinion that labeling milk, either as "Pasteurized Milk" or "Raw Milk," together with the name of the state in which the milk was produced, would sufficiently comply with the law requiring labeling of milk in such a way as to advise the purchaser or consumer of the nature and kind of such milk.

It is my opinion, therefore, that you may legally abandon your grade labeling policy during the emergency and permit milk to be labeled as "Pasteurized Milk," or "Raw Milk," if the public health will not be unduly

jeopardized and it is for the best interest of the public welfare, provided the Commissioner of Agriculture has prescribed such type of labeling, and provided further, the Sanitary Code has been amended by the State Board of Health in keeping with such authorization by the Commissioner of Agriculture.

January 4, 1944.—044-3.

#### MATERNAL AND CHILD HEALTH PLAN—OBSTETRICS; LIMITATION

**QUESTION:** What types of practitioners of the healing arts licensed in Florida to practice obstetrics may be paid for care of obstetrical patients under the State's Maternal and Child Health Plan?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

Only those practitioners of the healing arts authorized to practice obstetrics may be paid for care of obstetrical patients under such Maternal and Child Health Plan.

All physicians licensed by the State Board of Medical Examiners under Chapter 458, Florida Statutes, 1941, and all physicians licensed by the State Board of Osteopathic Examiners under Chapter 459, Florida Statutes, 1941, are authorized, in my opinion, to practice obstetrics.

Obstetrics is not mentioned specifically in the licenses of either group. These practitioners are, however, permitted by implication to practice obstetrics. The basis for such implication with reference to the first group is found in Section 458.09, Florida Statutes, 1941, wherein obstetrics is listed as one of the required subjects for examination, also in Section 458.13, Florida Statutes, 1941, wherein a practitioner of medicine is defined as one "who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition or who shall offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Practitioners under the first group are permitted to use all drugs and to practice all forms of surgery.

Practitioners under the second group, that is, osteopaths, are required under Section 459.09, Florida Statutes, 1941, to be examined in surgery and obstetrics. Osteopaths may prescribe all drugs which are taught in standard colleges or schools of osteopathy but no others. They may not practice major surgery unless they have had a four year course in an accredited osteopathic school or college or the equivalent thereof. See Section 459.07, Florida Statutes, 1941.

It is my opinion that major surgery, generally speaking, would contemplate Caesarian sections, while forceps operations and episiotomies would be embraced in minor surgery. However, you, being a physician, would probably know considerably more about the two terms, major and minor surgery, than I.

Under Florida Law, practitioners licensed by the State Board of Naturopathic Examiners under Chapter 462, Florida Statutes, 1941, may practice midwifery. However, it is my opinion that naturopaths while practicing midwifery are under the same limitations as midwives under Section 457.08, Florida Statutes, 1941, and can practice midwifery only in cases of normal labor. They may not, in my opinion, use instruments of any kind or assist labor in any artificial, forcible or mechanical manner. They are not permitted to practice *Materia Medica*.

September 1, 1943.—043-244.

#### MATERNITY AND INFANT CARE PROGRAM

**QUESTION:** Has the proposed emergency Maternity and Infant Care Program for this state been developed in accordance with the statutes of this state?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

From my examination of this plan, together with the law applicable thereto, I find that I cannot approve the same in its present status.

The Labor-Federal Security Appropriation Act, 1944, same being Chapter 221, Public Law 135, in making an appropriation for Maternal and Child Welfare provides that no part of such appropriation shall be used to promulgate or carry out any instruction, order or regulation relating to the care of obstetrical cases which discriminates between persons licensed under State Law to practice obstetrics, and that said proviso shall not be so construed as to prevent any patient from having the services of any practitioner of her own choice paid for out of said fund so long as state laws are complied with.

Physicians licensed by the State Board of Medical Examiners are authorized in this state to practice obstetrics. Also, osteopaths are permitted to practice obstetrics in this state under Chapter 459, Florida Statutes, 1941.

Your particular attention is called to Section 459.13, Florida Statutes, 1941, wherein it is provided that osteopathic physicians and surgeons shall have the same rights as physicians of other schools of medicine with respect to the treatment of cases or the holding of offices in public institutions.

On page 11, subparagraph (1) of the proposed plan which you have submitted for my approval, in my opinion limits the medical care which will be authorized under the plan to such medical care as may be furnished by doctors licensed by the State Board of Medical Examiners. In my opinion, this is a discrimination against osteopathic physicians and does not conform either with the Federal Law or the Statutes of this State.

November 1, 1943.—043-290.

#### MATERNITY AND INFANT CARE PROGRAM—AMENDMENT; LEGALITY

**QUESTION:** The emergency maternity and infant care plan has been amended so as to contain the following:

##### "Standards

##### "(1) Medical Services

Medical care provided under the plan will be authorized only when the attending physician or consultant is a graduate of a medical school approved (at the time of graduation or subsequent to graduation) by the Council of Medical Education and Hospitals of the American Medical Association, or when he is legally permitted to practice obstetrics in Florida under Chapter 459—Florida Statutes, 1941."

Does the foregoing amendment satisfy the state requirements?

*To Dr. Lucille J. Marsh, Director, Bureau of Maternal and Child Health,  
Jacksonville, Florida:*

The Labor-Federal Security Appropriation Act, 1944, same being Chapter 221, Public Law 135, in making an appropriation for maternal and child welfare, provides that no part of such appropriation shall be

used to promulgate or carry out any instruction, order or regulation relating to the care of obstetrical cases which discriminates between persons licensed under state law to practice obstetrics, and that said proviso shall not be so construed as to prevent any patient from having the services of any practitioner of her own choice paid for out of said fund so long as state laws are complied with.

I seriously doubt if the allowance of medical care may be conditioned upon the practitioner's graduation from an approved medical school when such practitioner may in fact be licensed to practice obstetrics in this state. I also call your attention to the fact that naturopaths are permitted to practice midwifery in the state of Florida, and in view of the fact that there is reliable authority to the effect that midwifery and obstetrics are synonymous, I would not care to approve a plan which would exclude naturopaths from its benefits.

Therefore, may I suggest that the foregoing amendment be further changed to read as follows:

**"Standards**

**"(1) Medical Services**

Medical care provided under the plan will be authorized only when the attending physician, consultant, or practitioner is licensed under applicable provisions of Florida Statutes to practice obstetrics in the State of Florida."

The foregoing will permit all practitioners lawfully entitled to do so, to share in the benefits of said plan, and of course will permit no others.

July 6, 1943.—043-153.

**NARCOTIC DRUGS—PRESCRIPTION BY NONRESIDENT PHYSICIANS**

**QUESTION:** Has the State Board of Health the authority to certify to the Federal Bureau of Narcotics for the purpose of dispensing narcotic drugs, those physicians who have been brought into this state by the Defense Council but who are neither registered with the State Board of Health nor licensed to practice medicine in this state?

*To Honorable Spessard L. Holland, Governor:*

I understand that these physicians, to whom your request refers, have been brought here from other states in cooperation with the United States Public Health Service and located in communities in this state where a serious shortage of physicians exists because of the present emergency.

I understand also that these physicians are usually commissioned by the United States Public Health Service, and receive a salary from that agency for their services. Such a physician is, I believe, furnished a nurse, and an office or clinic, and while he charges small fees for his services, such fees are used in operating the office or clinic and do not inure to the physician himself.

The Federal Statute requires all physicians dispensing narcotic drugs to register with the Federal Bureau of Narcotics and pay a tax. The right to so register and pay this tax depends on the right to dispense narcotic drugs under the State Law. See *Perry v. Larson*, Collector of Internal Revenue, 104 Fed. 2nd 728.

The Florida Narcotic Drug Law, which controls and directs the dispensers of such drugs, excepts therefrom registered physicians who dispense such drugs in the course of their professional practice, as well as other persons authorized by law to treat sick and injured human beings in this state, and to use, mix, or otherwise prepare narcotic drugs in connection with such treatment.

Those physicians to whom you refer are not authorized by our law to practice medicine in this state. They practice here solely through



an arrangement with the United States Public Health Service during the existing emergency.

It is therefore my opinion that the State Board of Health does not have authority to certify such physicians to the Federal Bureau of Narcotics for the purpose of dispensing narcotic drugs.

However, inasmuch as this emergency arrangement has been instituted by a Federal Agency in an effort to furnish physicians to those communities suffering from a lack of physicians, and since the laws of this state have been more or less waived in such instances, in order to cooperate with this effort, it appears to me that the State Board of Health could certify to the Federal Bureau of Narcotics that such physicians are commissioned by the United States Public Health Service and practice under the supervision and control of that Federal Agency.

Undoubtedly such physicians are legally authorized to practice medicine in some state. Certainly they are capable in their profession and men of good character and reputation. This being so, it would appear to me that the two Federal Agencies, the Federal Bureau of Narcotics, and the United States Public Health Service, should be able to get together on some system of registering these physicians with the Federal Bureau of Narcotics, in order that they may continue to render the emergency service they are commissioned to render.

January 30, 1943.—043-35.

#### QUARANTINE HOSPITALS—COMMITMENT PROCEDURE

QUESTION: What is the proper procedure to be followed in committing prostitutes infected with venereal disease to the quarantine hospitals operated by the State Board of Health?

*To the State Board of Health, Jacksonville, Florida:*

All persons confined or imprisoned in any state, county or city prison in this state may be examined for venereal disease by the health authorities or their deputies (Section 348.08, Florida Statutes, 1941).

Any representative of the State Board of Health may examine and inspect any person suspected of being afflicted with any infectious venereal disease. If the suspected person refuses to submit to such examination, the law (Section 384.04, Florida Statutes, 1941) provides that such refusal shall constitute a misdemeanor for which punishment may follow. Examination of the suspected party may be made under this statute in the following manner:

(1) If the suspected party consents to the examination and inspection, it is not necessary that warrant be obtained; however, as a safeguard against future repudiation, I suggest that this consent be obtained in writing, with two witnesses thereto.

(2) If the suspected party refuses to permit such examination and inspection, warrant of arrest may be obtained from a Justice of the Peace or other committing magistrate before whom the accused has been charged. In this instance, the one making the accusation should first be taken before the appropriate Justice of the Peace or committing magistrate and his sworn testimony produced before such committing magistrate and preferably reduced to writing. If his testimony demonstrates to the satisfaction of the committing magistrate that there are reasonable grounds to believe that such suspected person is afflicted with any infectious venereal disease, warrant of arrest may issue, which, on being served upon the suspected party, is authority for such party's apprehension, inspection and examination.

The warrant aforesaid should be served upon the suspected party by the appropriate Constable, Sheriff or Deputy Sheriff, by reading the original warrant to such party and delivering to said party a true copy thereof. Thereupon, the party named in the warrant and upon whom it has been served, should be taken into custody by the arresting officer and the examination and inspection made by a duly authorized representative of the State Board of Health.

The original warrant should then be returned to the Court issuing it, together with a report thereon of the acts and doings thereunder.

The accuser, for the purpose of securing the aforesaid warrant, may be anyone in possession of sufficient facts to show reasonable cause to believe that the suspected party is afflicted with any infectious venereal disease. If the accused or suspected party resides in a house of ill fame, prostitution or assignation, such residence is enough upon which to base suspicion that such person may be afflicted with an infectious venereal disease.

Examination and inspection of persons suspected of having an infectious venereal disease, therefore, may be made by virtue of (1) consent, (2) warrant, and (3) imprisonment.

When the examination and inspection have been made by virtue of either of the foregoing methods, and it has been ascertained from such examination that the suspected person does in fact have an infectious venereal disease, such person may be isolated, quarantined, and treated by the proper health authorities without further court order.

The problem now arises as to how such persons are to be transferred to the quarantine hospitals operated by the State Board of Health.

I would suggest that the following procedure be followed in transferring persons afflicted with infectious venereal disease to such hospitals:

- (1) Where the examination has been made pursuant to warrant, or by virtue of imprisonment, the representative of the State Board of Health making the examination and inspection should make a report to the Court having jurisdiction of the examined party, stating that the person named in the warrant or the prison inmate, stating the jail or place where imprisoned, has been duly examined by him and found to be afflicted with an infectious venereal disease, naming the disease and by virtue thereof said person is required to be transferred to the Florida State Board of Health Hospital, naming the location thereof, for quarantine and treatment until such time as such person may be cured of said disease or sooner released by the State Health Officer or his duly authorized deputy, as provided by law, and that pending admission of said person in the hospital named, said person is required to be held in quarantine and treated at a temporary place to be named in said report.

- (2) Where the examination is made with the consent of the party examined, the representative of the State Board of Health making the examination should execute a written order transferring said person to the Florida State Board of Health Hospital, naming the location thereof, which order should recite that the examination was made with the consent of the person so examined.

- (3) The representative of the State Board of Health making the quarantine orders aforesaid should immediately requisition the medical director of the hospital in question for admission of the person mentioned in such order, and when advised by the medical director that such person can be received at said hospital, such person should be transferred from the place of temporary quarantine to said hospital.

(4) When the infected person arrives at the hospital for quarantine, the medical director should be furnished the following:

(a) Certified copy of warrant (if any) on which the examination was made, together with copy of return thereof;

(b) The original written consent (if any) to the examination;

(c) The original order of quarantine pursuant to which the person is to be held in quarantine and treated for venereal disease, if such order was made as the result of an examination with the consent of the infected person;

(d) A certified copy of the examiner's report to the Court and the order of quarantine, where such examination and order have been made pursuant to warrant or imprisonment.

(5) If the person ordered into quarantine was a prisoner and the examination was made by virtue of that fact, the proper officer having custody of the jail where such person was imprisoned should be furnished with a certified copy of the quarantine order.

(6) All warrants, written consents, reports and quarantine orders should be carefully preserved and kept in a safe place. The warrants and reports to the Court, of course, will be filed with the Court.

Where the infected person is a prisoner, under the statutes such person may be quarantined in the jail where imprisoned. However, if in the opinion of the State Board of Health, the public health will be better served by transferring such person to one of the quarantine hospitals operated by the State Board of Health, then such prisoner may be transferred from the prison to such hospital, and in my opinion the time spent in the hospital may be credited on the sentence which such person was serving.

The State Board of Health may deputize its representatives to perform the various duties outlined herein. For this purpose it may deputize local city and county health officers, and in those counties where there are no city or county health officers, the Board may deputize local physicians.

It is further my opinion that the procedure outlined herein should be formally adopted by the State Board of Health as additional rules and regulations for the quarantine, prevention and treatment of venereal disease.

November 8, 1943.—043-303.

#### TUBERCULAR PERSONS—QUARANTINE AND ISOLATION

**QUESTION:** May a public official afflicted with tuberculosis be quarantined and isolated for the protection of the public health?

*To Honorable Spessard L. Holland, Governor:*

Section 381.49, Florida Statutes, 1941, authorizes the State Board of Health to make, adopt, promulgate, enforce, and from time to time amend and repeal, such rules and regulations covering sanitation and quarantine as may be necessary for the protection of the public health, such regulations so established to be known as the Sanitary Code of the State of Florida.

Section 381.51, Florida Statutes, 1941, provides that the Sanitary Code may provide for the care, segregation and isolation of persons having or suspected of having any communicable, contagious or infectious disease.

Pursuant to the foregoing authority, the State Board of Health has adopted the Sanitary Code of Florida and in Regulation 3 thereof, has declared all forms of tuberculosis to be infectious and communicable.

Regulation 21 of said Sanitary Code provides that persons affected with, or presumably affected with, tuberculosis or certain other diseases, shall, when necessary for the protection of the public health, be isolated or restricted in accordance with State Law and specific regulations of the Sanitary Code.

It is, therefore, my opinion that the State Board of Health, through its duly designated officials, has the authority to segregate and isolate persons infected with tuberculosis whenever such measures are found necessary for the protection of the public health.

September 27, 1943.—043-258.

#### VENEREAL DISEASE PATIENTS—TRANSPORTATION

**QUESTION:** May the Board of County Commissioners make use of the services of the County Health Officer (a salaried official of the county) to transport venereal patients to the hospitals maintained by the State Board of Health, and do this notwithstanding the Sheriff's objection, in view of the fact that transportation by the Health Officer would cost about one-fourth as much as the fee now paid the Sheriff?

*To the State Board of Health, Jacksonville, Florida:*

I can find no statute which imposes upon Boards of County Commissioners the duty of causing venereal patients to be transported to hospitals maintained by the State Board of Health.

Section 3, Chapter 21948, Laws of Florida, Acts of 1943, provides for the transportation of venereally infected persons to hospitals operated by the State Board of Health for quarantine and treatment. This section specifically provides as follows:

"... said health officer may cause such person to be transported by the sheriff or chief of police or duly authorized deputy sheriff of police officer, or by a duly authorized officer of the Florida Highway Patrol, and the expense incident to such transportation, in all cases except where transportation is by the Florida Highway Patrol, shall be paid by the county or municipality involved."

The above quoted statute does not appear to give anyone the exclusive right of transporting such persons to State Board of Health hospitals; however, it does provide that the Health Officer shall have the responsibility of causing such transportation, that is, arranging for it, and in doing so he has the right, and it is his duty, to provide the required transportation from the available sources given under the statute, that is, the Highway Patrol, Sheriff, Chief of Police, or duly authorized Deputy sheriff or police officer. In arranging for this transportation the Health Officer would be required to follow instructions from County Commissioners for county patients and proper city authorities for city patients as to what means of transportation would be used in the particular case. Where the statute makes several provisions for transportation, and the authorities responsible for the costs thereof are required to approve such bills of costs, it is within the right and power of such authorities to indicate which of the means of transportation is to be used for the purpose involved, provided, of course, that in emergency cases the officer responsible for the transportation, that is, the Health Officer, may use any one of the several means of transportation afforded, and the county or municipality whose patient is being transported would be required to pay the costs of same, if costs were entailed, where the incurring of such costs under all emergency conditions existing at the time can be shown to be justifiable. I think the Act contemplates the use of the Florida Highway Patrol for such emergency cases, and it is a reasonable interpretation to give the Act that this same transporting agency be used in all other cases where it is available without sacrifice in its own principal work.



It is therefore my opinion that the duty and responsibility of providing such transportation rests exclusively upon the Health Officer who has placed such persons under quarantine, and such Health Officer may cause such persons to be transported either by the police, the Sheriff, or the Florida Highway Patrol, the duty of selecting the appropriate means of transportation resting upon such Health Officer; subject, however, to the exceptions and conditional right of control set forth in the preceding paragraph.

## BUREAU OF VITAL STATISTICS

August 24, 1943.—043-215.

### SEALED BIRTH CERTIFICATES—OPENING

**QUESTION:** When may the seal be broken on an original certificate of illegitimate birth, for which a new certificate of legitimate birth has been issued under Sections 382.21 and 382.22, Florida Statutes, 1941?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

The provision of Section 382.21, *supra*, apply to three separate situations: (1) where the parents of a person whose birth has been previously registered have intermarried subsequent to the birth of such person, (2) where a court of competent jurisdiction has entered judgment determining the parentage of any person to be other than as registered, and (3) where a court of competent jurisdiction has entered a judgment or decree of adoption for the person whose birth has been previously registered.

In each of the foregoing situations, a new certificate of birth may be issued by the Bureau in place of the certificate previously issued.

Section 382.22, *supra*, applies to either of the three foregoing situations when a new certificate of birth is made. The judgment of the Court required by Section 382.22 has reference to the judgment of a court of competent jurisdiction ordering the opening of the sealed certificate. This does not necessarily mean that the Court which previously entered an adoption decree, or a judgment determining the parentage of the person, shall be the Court which orders the sealed certificate opened. Such an order may be entered by any court of competent jurisdiction.

Such sealed certificates as relate to illegitimate children subsequently legitimized can be opened only pursuant to judgment, decree or order of a court of competent jurisdiction, except at the request of the person whose birth is the subject of the sealed certificate, and only then when such person has established his or her identity to the satisfaction of the State Registrar.

## VENEREAL DISEASE

August 9, 1943.—043-201.

### COMPENSATION OF COUNTY OFFICIALS

**QUESTION:** What is the procedure with reference to persons committed who are afflicted with a venereal disease and the costs in connection therewith?

*To Honorable Bryan Willis, State Auditor:*

As far as the procedure is concerned, I believe that you will now find it set out in Chapter 21948, Laws of Florida, Acts of 1943; also you will find that the fees of the various officers are covered in most instances. However, where there is no specific coverage I am of the opinion that it should be borne by the county for the reason that you will note through-

out this Act all of the fees accruing to the Sheriff under this Act are paid by the county or municipality involved. Therefore, it was apparently the intention of the Legislature that all fees in connection with the enforcement of our Venereal Disease Laws were to be paid by the county or municipality involved. The only exception is that when persons who are under sentence or prosecution are placed in a hospital for venereal disease treatment, the expense of the return of said person, or if said person escapes, the expense of recapture of said person is borne by the State Board of Health.

January 21, 1944.—044-28.

#### COMPULSORY TREATMENT—PROSECUTION

**QUESTION:** Is the ordinary layman, if infected with venereal disease, subject to criminal prosecution for failure or refusal to take treatment for said disease?

*To Honorable Wm. D. Doss, Prosecuting Attorney, Quincy, Florida:*

Section 384.07, Florida Statutes, 1941, in part provides that State, County and Municipal Health Officers or their authorized deputies within their prospective jurisdictions shall, when in their judgment it is necessary to protect the public health, require persons infected with a venereal disease to report for treatment to a reputable physician and continue treatment until cured, or to submit to treatment provided at public expense.

Section 384.09, Florida Statutes, 1941, requires the State Board of Health to make such rules and regulations as shall in its judgment be necessary for carrying out the purposes of Chapter 384, Florida Statutes, 1941, relating to venereal diseases.

Section 384.05, Florida Statutes, 1941, makes it a misdemeanor for anyone to wilfully violate any rule or regulation promulgated by the State Board of Health under the authority of Chapter 384, *supra*.

Pursuant to its rule making authority, the State Board of Health has adopted Regulation 49 of the Sanitary Code of the State of Florida (also see Section 381.49, Florida Statutes, 1941 for authority to adopt the Sanitary Code), which provides as follows:

**"Regulation 49:** Any person afflicted with a venereal disease who fails or refuses to undergo proper treatment for the disease shall be isolated or quarantined for the period during which the patient refuses treatment, or until the health officer is satisfied that he is no longer capable of disseminating infection."

From the foregoing statutes and regulation, it is my opinion that where the ordinary layman infected with venereal disease fails or refuses to undergo proper treatment, it is the duty of the Health Authorities to isolate or quarantine such person under Regulation 49, *supra*, rather than prosecute such person criminally. Of course, if after being isolated or quarantined such person then violates the isolation or quarantine order, such person may be prosecuted criminally under Section 381.20, Florida Statutes, 1941, which provides a penalty for disobeying quarantine regulations.

March 20, 1944.—044-78.

#### MILITARY SERVICE—PERSONS REJECTED OR DEFERRED

**QUESTION:** Are persons who are rejected or deferred for military service because infected with a venereal disease liable for prosecution after they have reported to a venereal disease clinic but refused to take treatment?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

The provisions of Section 1, Chapter 21659, Acts of 1943, clearly require that such a person report to the clinic and (1) furnish satisfactory proof to the Health Officer in charge that such person is taking and will continue to take treatment for such disease from a reputable physician until cured, or (2) in lieu of furnishing such proof submit to treatment at public expense under the supervision of the clinic.

The provisions of Section 2 of said chapter provide: (1) that notice from a Draft Board that the person named therein is infected with venereal disease shall constitute prima facie evidence of such infection and (2) refusal of such a person to report to the venereal disease clinic as provided in Section 1 shall constitute a misdemeanor.

While a casual reading of the Act would appear to indicate that if such a person once reported to the health clinic and furnished satisfactory proof that he was taking and would continue to take treatment from a reputable physician until cured, or agreed on reporting to submit to treatment at public expense under supervision of the clinic, he would have fully satisfied the Act. But a more careful study of the language of the Act discloses that the mere initial appearance of such person at the health clinic and the furnishing of satisfactory proof at that time of the taking of treatment from a reputable physician or the agreement of such person at the time of his initial appearance to submit to treatment at the clinic, is not all that may be required of such a person under the Act.

If the Health Officer in charge of the venereal disease clinic has reliable information at any time that such a person so infected who has previously reported to the health clinic is failing and refusing to continue to take treatment either from a reputable physician or from the clinic, such officer may notify such person to report to the clinic and show proof that he is taking and will continue to take treatment from a reputable physician or in lieu of furnishing such proof submit to treatment at the clinic.

If he refuses to report and furnish such proof or to report and submit to treatment when notified to do so, he is guilty of an offense under the Act. Or, if he reports but fails or refuses to furnish such proof, or fails or refuses to submit to treatment he is guilty of an offense under the Act.

The Act is designed not merely to require such a person to make an initial report with satisfactory proof of the taking of treatment from a physician or, in lieu of furnishing such proof, submission to treatment at the clinic, but contemplates that such a person during continuance of the infection shall respond to any one or more notices from the Health Officer to show proof that such treatment is being continued or to submit to continued treatment at the clinic. Of course, the Act presumes that the Health Officer will not unreasonably require such a person to report after he has initially reported unless the Health Officer has good reason to believe that such person is not continuing to take treatment.

March 6, 1943.—043-66.

#### SELECTEES—ENFORCED TREATMENT

**QUESTION:** What evidence should be available in order to force selectees who have been rejected for military service because of venereal disease infection to take treatment therefor? May records of the Draft Board be subpoenaed, and would evidence from the State Board of Health be available?

*To Honorable Spessard L. Holland, Governor:*

When a selectee is given a physical examination by order of his local Draft Board, and the examination discloses that he is unfit for military service by reason of venereal disease infection, he is so notified by the

Draft Board, and advised that the State Law requires that treatment be taken in all such cases, and that he should report to the nearest venereal disease clinic of the State Board of Health for that purpose. A copy of such notice is also given to the nearest State Board of Health venereal disease clinic.

These selectees are not persons suspected of having venereal disease. They are known to be so infected. Under Section 384.07, Florida Statutes, 1941, State, County, and Municipal Health Officers are authorized to require persons infected with a venereal disease to report for treatment to a reputable physician and continue such treatment until cured, or to submit to treatment provided at public expense. This section also authorizes the isolation of persons infected with venereal disease.

Section 384.09, Florida Statutes, 1941, authorizes the State Board of Health to make such rules and regulations as shall be necessary for enforcing and carrying out our venereal disease laws, and such rules and regulations have the force and effect of law.

Pursuant to this authority, the State Board of Health has adopted Regulation 49, which provides as follows:

**"Regulation 49:** Any person afflicted with a venereal disease who fails or refuses to undergo proper treatment for the disease shall be isolated or quarantined for the period during which the patient refuses treatment, or until the health officer is satisfied that he is no longer capable of disseminating infection."

Section 384.05, Florida Statutes, 1941, provides that any persons wilfully violating any rule or regulation promulgated by the State Board of Health under the authority of law shall be deemed guilty of a misdemeanor and may be punished as for a misdemeanor.

All selectees reported by Draft Boards to the State Board of Health venereal disease clinics as being infected with venereal disease should be contacted by the proper Health Officer and ordered to report for treatment either to a reputable physician or to the venereal disease clinic at public expense. This order should be in writing and delivered to the infected person in such a way that its receipt by such person can be proven, that is, by registered mail or in person in the presence of a witness or witnesses or in some other similar manner.

If such selectee then wilfully violates such order, he may be prosecuted under Section 384.05, supra, as for a misdemeanor. He may also be isolated, quarantined and treated by order of the Health Officer without court order therefor.

I do not believe that the records of the local Draft Board could be subpoenaed. However, I feel sure the Selective Service Officials would make such records available for the purpose of requiring rejected selectees to take the necessary venereal disease treatment. Any laboratory records of the State Board of Health obtained by making laboratory tests as a part of the selective service physical examination, are, in my opinion, a part of the selective service records and could not be subpoenaed; however, I feel sure that with reference to this type of evidence the Selective Service Officials would permit the State Board of Health to make such records available for the purpose herein indicated.

It is my opinion that the notice to the venereal disease clinic by the Draft Board hereinbefore referred to, and the selectee's failure or refusal to submit to treatment after being ordered to take such treatment by the proper Health Officer, would constitute sufficient probable cause for issuance of warrant for failure to take such treatment if prosecution is desired rather than quarantine. However, I believe that the Health Officer under such circumstances could institute quarantine and isolation without resorting to prosecution.



November 19, 1943.—043-310.

#### TRANSPORTATION OF INFECTED PERSONS

**QUESTION:** Who should pay the expense of transporting to State Board of Health Quarantine Hospitals persons who are infected with venereal disease and who request voluntary treatment in such hospitals, but who are neither immoral nor promiscuous, but who have contracted said disease from their husbands?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

Before anyone can be quarantined in the hospitals operated by the State Board of Health, it must appear to the satisfaction of the hospital authorities that (1) the person is infected with a venereal disease, and (2) that it is necessary that such person be isolated in order to protect the public health.

Where an infected person is neither immoral nor promiscuous, but has contracted the disease from her husband, it would appear that such person is not subject to quarantine and treatment in a State Board of Health hospital, but on the contrary should be given treatment either by private physicians or at public expense, depending, of course, upon the circumstances of the case. However, if the Public Health Authorities determine that any given case requires quarantine, and as a consequence enter a quarantine order against such person, her transportation to the quarantine hospital should be handled in the usual manner whether such person has been arrested or not. The Public Health Authorities are charged with the duty of determining when quarantine is necessary, and once having determined that, and having issued the quarantine order, all cases should be handled in the same manner as nearly as is practicable.

#### NUISANCES INJURIOUS TO HEALTH

April 10, 1944.—044-123.

#### LANDLORDS—RESPONSIBILITY

**QUESTION:** When a landlord rents property that has been equipped with sanitary privies, and in the natural course of events these privies become filled up to overflowing and need repairing, who is responsible for cleaning and repairing them—the tenant or the landlord?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

This subject is covered by Sections 386.01 to 386.09, inclusive, Florida Statutes, 1941.

In my opinion the landlord will always be responsible for unsanitary privies on premises he owns and he may always be named in the notice of the Health Officer as the person to remove the nuisance or be prosecuted for violations of said sections.

This duty of the landlord as to unsanitary privies may by the terms of the rental agreement between the landlord and tenant also become the responsibility of the tenant where it is clear that the rental agreement contemplates that the tenant will repair and keep the privies in a sanitary condition.

However, it is my opinion that a landlord cannot by a rental agreement absolve himself of the responsibility of keeping privies on premises he owns in a sanitary condition because such duty is placed upon him by law and cannot be transferred by agreement. The tenant may agree to assume such responsibility to the same extent as the landlord but the law does not contemplate that the landlord shall escape his respon-

sibility for sanitation on his premises by showing that the tenant has assumed sole responsibility.

Section 386.07, Florida Statutes, 1941, provides: "any person owning or occupying premises on which any privy is situated" is subject to the requirements of law for the abatement of a nuisance and for prosecution for failure to abate it.

In each particular case it should be determined whether the tenant has assumed responsibility for the repair and sanitation of the privies. Then if he has done so, you may proceed against him or against the landlord, whichever the facts indicate would be most expeditious in abating the nuisance.

### TUBERCULOSIS SANATORIUM

January 14, 1943.—043-12.

#### INDIGENT PATIENTS—RESIDENCE REQUIREMENTS

**QUESTION:** The wife of a sailor stationed at the Naval Air Base in Jacksonville has been diagnosed as having a moderately advanced case of tuberculosis. She is nineteen years of age, and has a good chance of recovery if she can secure treatment, but will die if she cannot. She was born, reared and educated in Columbia County, and left there temporarily only for the purpose of being near her husband at his station in Jacksonville, intending to return to her home in Columbia County. She desires admission to the State Tuberculosis Sanatorium for treatment, and her father and husband have agreed to pay the county's one-third, or 92¢ per day, for her care at the State Sanatorium. If necessary, this amount can be deducted from the small pay of her husband, who is a sailor offering his life for his country. She is not a legal resident of Duval County, and therefore her application cannot be considered by Duval County officials. The Board of County Commissioners of Columbia County, the county of her residence, have three times rejected her application, on the ground that she is not a resident of Columbia County. May the State Tuberculosis Sanatorium admit this semi-indigent patient without the approval of the Board of County Commissioners of Columbia County, the county of her residence?

*To the State Tuberculosis Board, Jacksonville, Florida:*

The management and operation of the State Tuberculosis Sanatorium is placed in the hands of the State Tuberculosis Board, and it is the Board's duty and responsibility to determine in each case whether the applicant meets the statutory residence requirements for admission.

Boards of County Commissioners pass upon admission of applicants from their county to the Sanatorium only for the purpose of determining whether or not the county will pay one-third of the daily hospital charges for such patients as may be indigent.

If the applicant is semi-indigent, or is financially able to pay his or her own hospital charges, either in full or in part, such applicant may be admitted by the State Tuberculosis Board upon such terms and conditions as it may deem proper, provided such applicant is a legal resident of the State of Florida and has been for one year prior to applying for such admission. If the patient is able to pay one-third or more, but less than the full amount, of such hospital charges, the balance shall, within the limits of the State appropriation therefor, be paid by the State of Florida. The State Tuberculosis Sanatorium is a benevolent State Institution for the benefit of citizens and residents of the State of Florida, and the various Boards of County Commissioners of the State are authorized to send patients from their counties to such sanatorium, provided the county pays one-third of the daily hospital charges, the remaining two-thirds to be paid by the State. This is, in my opinion, a discretionary matter

with the Boards of County Commissioners, and they cannot be coerced into approving applications from their county for admission to the sanatorium. However, where no part of the hospital charges is to be paid by the county, the Board of County Commissioners of such county, in my opinion, has nothing whatever to do with the admission of such patients. It is my opinion that, where an applicant is able to pay one-third of the hospital charges, as seems to be true in this case, and the State Tuberculosis Board is satisfied that the applicant meets the residence requirements, and is satisfied with the financial arrangement made by the applicant for the payment of one-third of such charges, such applicant may be admitted to the State Tuberculosis Sanatorium without the approval of the Board of County Commissioners of the county of the applicant's residence. A worthy and qualified resident of this state cannot, in my opinion, be denied the benefits of this benevolent State Institution because of some controversy over the situs of his or her local residence within the State, where such person is and has been for more than one year a resident of this state and is willing and able to defray one-third or more of the charges for such benefits.

### FLORIDA STATE HOSPITAL

August 26, 1944.—044-251.

#### BOARD OF COMMISSIONERS—AUTHORITY TO EXPEND MONEYS

**QUESTION:** Has the Board of Commissioners of State Institutions legislative authority to expend moneys from the Special Maintenance Fund of the Florida State Hospital for the construction of a ward for invalid patients of said Institution?

*To Honorable J. R. McClure, Secretary, Board of Commissioners of State Institutions:*

In reply to your inquiry as to whether or not the Board has legislative authority to expend moneys from the Special Maintenance Fund of the Florida State Hospital for the construction of the above ward for invalid patients of said Institution, I beg leave to state that in Section 4 of Chapter 22071 (1943 Appropriation Act) very broad and comprehensive powers were conferred upon the State Board of Control and the Board of Commissioners of State Institutions in the following language:

"All moneys received by the institutions under the management of the State Board of Control and the Board of Commissioners of State institutions other than from State or Federal sources, are hereby appropriated to the use of the State Board of Control and the Board of Commissioners of State Institutions, for the respective Institutions collecting same, to be expended as said Boards may direct and said moneys shall not be deducted from the sums otherwise appropriated by this Act to said Institutions."

From the foregoing, it is my opinion that the Board has the legislative authority referred to in your letter.

June 8, 1944.—044-164.

#### COMMITMENT—ALIEN

**QUESTION:** May an alien who has resided in this state for more than twenty years last past, if adjudged insane and in need of confinement or treatment, be committed to the Florida State Hospital?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

Section 394.27, Florida Statutes, 1941, provides that no person shall be committed to or received as a patient at the Florida State Hospital who has not been a "bona fide resident" of this state continuously for

one year immediately preceding the examination of said person, as provided by Section 394.21.

In the case of *Herron v. Passailaigue* (Fla.) 110 So. 539, our Court held that the rule is well settled that "resident," "residing in," or equivalent terms, when used in statutes, or actions or suits relating to taxation, right of suffrage, divorce, limitations of actions and the like are used in the sense of "legal residence." In the case of *Minick v. Minick*, (Fla.) 149 So. 483, the Court differentiates between "residence" and "domicile," stating in effect that any place of abode or dwelling place constitutes a "residence," while the term "domicile" relates rather to "legal residence" or fixed place of abode. Our Supreme Court has further indicated that legal residence or domicile may be acquired by one coming from another state or country into this state with the intention of permanently remaining here. *Warren v. Warren*, 75 So. 35. In my opinion, "bona fide resident" as used in the above Section 394.27 may be construed "legal resident."

It is my judgment that in the above section of the law the term "bona fide resident" is not synonymous with "citizen." While on the one hand the Florida State Hospital affords facilities for the treatment and care of those who are mentally afflicted, many of whom are indigent, on the other hand there is the problem of a community charged with the care of a person in such mental and financial condition, without facilities to properly care for or treat one so afflicted. It is my belief that the fact that the man referred to in your letter is not a citizen of this country does not make him any less a "bona fide resident" within the meaning of the above Section 394.21.

September 21, 1943.—043-249.

#### COMMITMENT—ALIEN BRITISH SUBJECT

QUESTION: Is the estranged wife of a British subject, who has resided in the State for a number of years, eligible to hospitalization at the expense of the State of Florida?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

It appears that the person in question and her husband are British subjects, and that for some years past she has been living in New York, and has been estranged and separated from her husband for about fifteen years.

Under these circumstances it is my opinion that your inquiry should be answered in the negative.

As I advised you in a previous case (vide: letter of March 9, 1943),

"While the domicile of the wife is generally considered to be the same as that of the husband, nevertheless it is my opinion that the statutes above referred to contemplate an actual residence within the State of Florida for a one-year period rather than a constructive residence."

In the case of an alien, where there are no ties of citizenship, this impression is, if possible, more positive.

October 12, 1943.—043-281.

#### COMMITMENT—ELIGIBILITY

QUESTION: Is a person entitled to admission to the State Hospital whose application states that the cause of that person's condition is acute alcoholism with the physical condition of the patient marked as fair?



*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

Section 5, Chapter 20504, Acts of 1941, seems to answer this question.

Under that statute, if the cause of the applicant's condition is acute alcoholism, as it is stated to be, then the only other condition to be ascertained in order to arrive at a decision as to his eligibility, would be to ascertain whether he is a person "not demonstrating a psychosis."

This condition while hinted at in the application does not appear to be definitely ascertained, hence, the opinion must be a conditional one, and to this effect:

If the patient is one demonstrating a psychosis, he is, under the existing law, entitled to admission, if not, he is not so entitled, which is a matter for judicial determination under the provisions of Section 394.22, Florida Statutes, 1941.

December 6, 1943.—043-325.

#### COMMITMENT—STATUTORY REQUIREMENTS

**QUESTION:** Will the Florida State Hospital accept disenrolled U. S. maritime trainees, residents of Florida, needing psychiatric care?

*To the Board of Commissioners of State Institutions:*

Section 394.25, Florida Statutes, 1941, provides that no person shall be received as a patient in the Florida State Hospital except upon a commitment duly issued by a County Judge under whose jurisdiction an examination of such a person has been conducted, or unless the commitment issued in pursuance of such examination shall specifically commit the person to the Florida State Hospital.

By Sections 394.20, 394.21 and 394.22, it is provided that a petition to the County Judge for examination of a supposed insane person must be filed and an examining committee appointed to examine the person mentioned and findings in pursuance thereof.

By Section 394.24 the minimum age of a person committed is fixed at fifteen years.

By Section 394.26 it is provided that chronic alcoholics, as such, and other persons not demonstrating a psychosis shall not be admitted to, or received as, patients for treatment in the Florida State Hospital, and that no person shall be so committed by reason of senility alone.

By Section 394.27, it is provided that no person shall be admitted to, or received as, a patient for treatment in the Florida State Hospital, who has not been a bona fide resident of the State of Florida continuously for one year immediately preceding the examination of the person under the provisions of Section 394.21.

In addition to the foregoing it is suggested that before authority for such an admission be given to the Superintendent, information as to the cause of the disenrollee's condition be given to your Board.

It is further suggested that the Chief Medical Officer of the United States Public Health Service be requested to furnish the Board with copies of all rules, regulations and provisions having to do with the care of such persons by the Federal Government and citations on all Federal Statutes bearing upon the subject.

August 18, 1944.—044-245.

#### CUSTODY AND CONTROL OF PATIENTS

**QUESTION:** When a person is admitted to the Florida State Hospital as an inmate or patient, do the authorities have legal control over said person which would permit them to subject such inmate or patient to all necessary and proper restraint, when the inmate or patient is admitted under the following classifications:

1. As a paying inmate without commitment and without guardian, accepted through the order of the Board of Commissioners of State Institutions;
2. As a paying patient, admitted by the Board of Commissioners of State Institutions upon application of a duly appointed court guardian for the proposed inmate or patient, but without any order of commitment;
3. As a paying patient or inmate from another state, admitted upon a reciprocal agreement between Florida and the other state, an order of commitment for an institution in such other state having been made, or an order adjudging such person to be insane by such other state having been made, but with no such judicial order or orders having been made within the State of Florida, and without any order of approval or authorization from the Board of Commissioners of State Institutions?

*To Honorable Spessard L. Holland, Chairman, Board of Commissioners of State Institutions:*

The first two inquiries, I believe, are those in which the Comptroller is primarily and especially interested. While preparing my answers to them, I have included also the additional question under the original predicate.

1. The answer to inquiry number one is no. The Board of Commissioners of State Institutions has no authority to place an inmate or a patient in the hospital unless such inmate or patient is an insane person. It is not within the power of the Board of Commissioners of State Institutions to pass upon the sanity or insanity of an applicant for admission to the Institution. Such must have been judicially determined by a court of competent jurisdiction whose order of mental determination or status is entitled to credence.

2. The answer to inquiry number two is yes, with this proviso: a patient or inmate whose insanity has been determined by a court of competent jurisdiction and for whom a guardian shall have been appointed, or who, even though no guardian has been appointed, may be admitted to the Florida State Hospital upon the express order of commitment of the Board of Commissioners of State Institutions without any order of commitment from a County Judge or other Court. Section 394.10. I am aware of the provisions of Section 394.25, but to give each section, to wit, 394.10 and 394.25, the application, force and effect which the language thereof requires, demands the construction and interpretation here made.

The foregoing concludes the inquiries in which I believe the Comptroller was especially interested.

3. An applicant from another state seeking admission to the Florida State Hospital may be admitted upon express commitment and order of the Board of Commissioners of State Institutions if such applicant has been adjudged insane by a court of competent jurisdiction in another state and if such applicant's friends, relatives or guardian are able and willing to pay for the care, custody and maintenance of said proposed inmate or patient and if such proposed inmate or patient has been a resident of the State of Florida for a year preceding his or her adjudication of insanity. Such patient or proposed inmate cannot be admitted upon any reciprocal agreement between Florida and the other states except upon the

express commitment of the Board of Commissioners of State Institutions made to the import and in the form and manner here described.

To be read into this opinion is the unstated but nevertheless fully recognized jurisdiction of a Court of Chancery in our State to declare a person to be insane and name a guardian over him.

February 12, 1943.—043-55.

#### INMATES—INTERNEED ALIEN

**QUESTION:** Has the Florida State Hospital the right to accept an interned alien as an inmate?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

I respectfully advise you that in my opinion this internee may not be committed or received for treatment at the Florida State Hospital either at State expense, or otherwise within the legal authority of that Institution.

July 14, 1943.—043-161.

#### INSANE PERSONS FROM OTHER STATES—TRANSPORTATION

**QUESTION:** What is the proper disposition to be made of a person charged with the commission of a crime in Florida and found to be insane by a committee of doctors appointed by the Circuit Court to inquire into his sanity, when such person is an escaped inmate of the insane asylum of a sister state, which state is willing to resume custody of such person but refuses to defray the costs of transportation?

*To Honorable W. M. Smiley, Assistant State Attorney, Bradenton, Florida:*

The statutes of this state provide that if, before or during trial, the Court decides that the defendant is insane, it shall take proper steps to have the defendant committed to the proper institution.

While the statutes provide that no one may be committed to or received by the Florida State Hospital for treatment who has not been a resident of the State of Florida for at least one year prior to the examination of such person, it is my opinion that this prohibition does not apply to insane persons charged with or convicted of crime. Such persons may, in my opinion, be committed to and received by the Florida State Hospital regardless of the period of residence in this state.

With particular reference to the situation you have described, the Circuit Judge should commit the defendant to the Florida State Hospital, not for treatment but for transfer to the proper officials of the institution of the sister state from which he has escaped. Our State Hospital has a fund available, out of which it may provide for transportation of such persons to the sister state.

With reference to the transportation of the person in question from your county to the Florida State Hospital, such person may be transported in the bus operated by the State Hospital for that purpose, upon making necessary arrangements with the Superintendent of said Hospital. However, the Sheriff is required to furnish such guards as may be necessary under the circumstances to accompany such person, the expenses of which guards must be borne by the county from which such person is transported to the State Hospital.

January 17, 1944.—044-20.

#### LEASE OF PERSONAL PROPERTY

**QUESTION:** May the Secretary of the Board execute a lease of personal property on behalf of the Board?

*To Honorable J. R. McClure, Secretary, Board of Commissioners of State Institutions:*

I do not find any reason why the proposed lease should not be accepted and signed by the Board.

Replying specifically to your inquiry as to whether or not the Secretary of the Board may execute the same on behalf of the Board, I beg leave to state that as this is a contract for the leasing of personal property and involves no real estate, it is my opinion that the Secretary may sign it on behalf of the Board, if previously authorized by its resolution so to do.

March 13, 1943.—043-73.

#### MILITARY SERVICE—DISABILITIES

**QUESTION:** It appears that a man was inducted into the military service on May 30, 1941, and while in such service he became a patient in the Neuropsychiatric Section of the Station Hospital at Camp Pickett, Virginia, on December 29, 1942, about eighteen months after he entered the Army. It further appears that he is now totally incapacitated for further service in the Army, and request has been made for his admission and treatment at Florida State Hospital as a legal resident of Florida. The medical report states that he contracted syphilis in 1925, was insufficiently treated, and eight years later secondary eruption appeared. Apparently the Army Medical Officials would treat this as the onset of his present mental infirmity. Should he be received at Florida State Hospital and given treatment as a Florida citizen, or should his present mental condition be considered as a service-connected disability for which treatment the Federal Government is responsible?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

Paragraph 18, Army Regulations, 40-1025, provides:

**"Dementia Praecox, manic depressive psychosis, psychoses of a similar nature; and the psychoneuroses.**—All cases of dementia praecox, manic depressive psychosis, psychoses of a similar nature, and psychoneurosis developing within 6 months after entry into active military service will be regarded as having existed prior to service. Cases developing after 6 months' active service will be regarded as having been incurred in line of duty, when the period between any two periods of extended active duty or any two enlistments has not exceeded 6 months and when a careful review of the past history fails to elicit evidence of mental abnormality or functional nervous disorder before the original entrance into active military service or during the first 6 months of such service."

Under the foregoing regulation, it is my opinion that the present mental disability of this man must be considered as having been incurred in line of duty. It does not appear that he was suffering from any mental abnormality or functional nervous disorder before his original induction into active military service or during the first six months of such service. On the contrary, his present condition appears to have developed after he had given eighteen months service to the Army, and while his past medical history may have some bearing upon his present condition, it may also be that his military service awakened and fermented a predisposition to insanity which otherwise may have remained quiescent. The showing in this case is not, in my opinion, sufficient to remove the presumption that his present mental disability is service-connected. This being so, it follows that his institutional care is the responsibility of the Federal Government and not of the State of Florida.



April 10, 1944.—044-124.

### NONRESIDENTS

**QUESTION:** Is a nonresident eligible for commitment as a patient in the Florida State Hospital?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

It appears that the subject-patient was born in Jacksonville. After serving a sentence in a Federal Penitentiary in the State of Missouri, he returned to Jacksonville, and thereafter departed for New York with the intent of securing employment. Under the circumstances, it would appear that the person in question has not resided in or made Florida his place of residence continuously within one year before this date, and it might be said that he left the State of Florida with the intent and purpose of making another state his permanent home, or at least with no intention of returning to Florida.

Taking into consideration the circumstances mentioned above, it appears that he is not eligible for commitment as a patient or for reception by the State Hospital.

It may be said in addition that it does not appear that the subject-patient has ever been adjudicated or that any commitment proceedings have ever taken place; hence, under the terms and provisions of Chapter 394, Florida Statutes, 1941, he should not be received.

### UNIFORM NARCOTIC DRUG LAW

April 24, 1944.—044-138.

#### ADDICTS—COMMITMENT TO HOSPITAL AT RAIFFORD

**QUESTION:** May Judges of the Circuit Courts of Record and Criminal Courts of Record, commit narcotic addicts to the State Penitentiary, for treatment in the prison hospital, for indefinite periods of time, where no criminal charge has been preferred?

*To Honorable M. H. Doss, Director, State Bureau of Narcotics,  
Jacksonville, Florida:*

It appears from the request for an opinion that one of the Circuit Judges of this state, by his order, committed a habitual user of narcotic drugs to the hospital at the State Prison at Raiford, Florida, for treatment. The request for an opinion raises the question of the validity of this commitment.

In the first place it would not be seemly for me to render an opinion conflicting with the determination of the Circuit Judge, and, if I did, it would have no effect as against an adjudication in an actual case. The only way in which the order can be disturbed is for the committing Judge to vacate it or for the Supreme Court to reverse it.

In the second place, the statute upon which said Judge predicated his order appears to authorize such a holding. A portion of said statute (Section 398.18, Florida Statutes, 1941) reads as follows:

"(2) At the time and place specified in the notice, the person named or described in such notice, or his counsel, being present, the judge shall hear the evidence presented, and shall appoint a commission of two physicians who shall examine such person and certify to the court as to whether such person is a habitual user of habit-forming drugs as contemplated in subsection (1)."

Upon being satisfied that the allegations contained in the affidavit are true, the judge shall make and file an order requiring the person named or described to forthwith take and continue treatment for the cure of such drug addiction at a private institution under medical supervision to be selected by the person committed, and approved by the state board of health, if such person is able to pay therefor, otherwise **at some hospital or institution under medical supervision owned by the State of Florida or the United States** and at the expense of the State of Florida or the United States, which maintains such institution. . . ." (Emphasis supplied)

The order of commitment recites facts which disclose that the person committed comes squarely within the class referred to in the quoted portion of the statute, and that there was due compliance with all prerequisite procedure required by the statute for the commitment.

Inasmuch as said Section 398.18 provides that a Judge of any court of competent jurisdiction of violations of the Uniform Narcotic Drug Act may commit narcotic addicts for treatment it is my opinion that Judges of Criminal Courts of Record and Circuit Judges have the authority under said section to commit such addicts since any violation of said Act is made a felony by Section 398.22, Florida Statutes, 1941.

February 7, 1944.—044-48.

#### ENFORCEMENT—STATE POLICE—BOND

**QUESTION:** May Narcotic Inspectors be appointed to enforce the State Narcotic Laws on an honorary basis without bond, without compensation and without being under the direct supervision of your Bureau or the State Board of Health?

*To Honorable M. H. Doss, Director, State Bureau of Narcotics,  
Jacksonville, Florida:*

The statute governing the enforcement of the State's Narcotic Law is Section 398.21, Florida Statutes 1941, which reads as follows:

"The state board of health, its agents, inspectors, officers and representatives, and all peace officers of the state, and all prosecuting attorneys, shall enforce all provisions of this chapter, except those specifically delegated, and shall cooperate with all agencies charged with the enforcement of the laws of the United States, this state, and all other states relating to narcotic drugs. All officers, agents, inspectors, and representatives of the state board of health engaged in the enforcement of the provisions of this chapter, shall in addition to their respective positions be designated as 'state police' and shall have the same authority as a deputy sheriff to bear arms concealed or otherwise, and to make searches, seizures, and to arrest with or without warrants for any violation of the provisions of this chapter, and any other laws of the State of Florida; provided, however, that such officers, agents, inspectors and representatives, shall first furnish a bond of not less than one thousand dollars approved by the state board of health and made payable to the governor of this state."

It follows that the enforcement generally of all provisions of the State's Uniform Narcotic Drug Law as distinguished from the enforcement of specific provisions of the Law by specified persons, is delegated to all peace officers and Prosecuting Attorneys of the State and to officers, agents, inspectors and representatives of the State Board of Health and to no other persons.

The officers, agents, inspectors and representatives of the Board of Health necessarily must perform their enforcement duties under the direct supervision of the Board of Health and are required to furnish the required bond of not less than one thousand dollars. However, this is not the case with regard to peace officers and Prosecuting Attorneys.

It is not required by this section that such agents, inspectors, representatives or officers of the Board of Health be compensated in order to perform such duties, but this section leaves questions of their being compensated to the discretion of the Board.

March 29, 1944.—044-114.

#### VIOLETIONS—COURTS; JURISDICTION

**QUESTION:** Where the violation of the Narcotic Law is a felony, has the County Judge jurisdiction, upon the motion of the County Attorney, to enter a nolle prosequi?

*To Honorable M. H. Doss, Director, State Bureau of Narcotics,  
Jacksonville, Florida:*

The Circuit Court has jurisdiction to try all felony cases except in counties having a Criminal Court of Record. Criminal Courts of Record have jurisdiction to try all felony cases except capital cases. County Judge's Courts have no jurisdiction to try felony cases.

County Judges are made committing magistrates in criminal cases by the Constitution of the State of Florida, and therefore any criminal prosecution may be instituted in the County Judge's Court. The County Judge has authority to issue warrants and hold preliminary hearings in felony cases, and in such cases he may bind the defendant over for trial to the Circuit Court or Criminal Court of Record as the case may be, or dismiss the case or enter a nolle prosequi at the instance of the County Attorney. The dismissal or entry of a nolle prosequi in a felony case pending before the County Judge does not preclude the State Attorney or the County Solicitor from instituting criminal proceedings for the same case in the Circuit Court or Criminal Court of Record, as the case may be, and likewise does not preclude the grand jury from returning an indictment for the same offense.

All criminal prosecutions in felony cases except capital cases may be instituted either (1) by making an affidavit before a committing magistrate, (2) by information filed by the State Attorney or County Solicitor, as the case may be, and (3) by indictment returned by the grand jury.

This is not to be considered as an official opinion for the reason that it is the policy of this office not to render official opinions to one department of the State Government concerning and relating to the powers and duties of another department of the State Government. However, the jurisdiction of courts to try criminal cases is fixed by law as I have outlined above.

August 8, 1944.—044-228.

#### WHOLESALE DEALER'S LICENSE—REQUIREMENTS

**QUESTION:** Has the State Board of Health authority under the State Narcotic Drug Law to refuse a wholesaler a narcotic license because his place of business is not operated as a wholesale drug company and because he does not employ duly licensed pharmacists in charge of narcotic drugs?

*To Honorable M. H. Doss, Director, State Bureau of Narcotics,  
Jacksonville, Florida:*

It is my opinion that the Uniform Narcotic Drug Law (Chapter 398, Florida Statutes, 1941) does not authorize the State Board of Health to refuse a wholesale narcotic license to a wholesaler because his place of business is not operated as a wholesale drug company and because he does not employ duly licensed pharmacists in charge of narcotic drugs.

A wholesaler is defined in Section 398.02(5), Florida Statutes, 1941, as a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions. This definition excludes the idea that he must operate a wholesale drug company or store. It is inclusive enough to mean that such wholesaler may operate a wholesale drug company or store exclusively or in connection with a general wholesale business in which he sells many articles of trade besides narcotic drugs. The word person in the definition may mean an individual or a corporation. Section 398.05.

Moreover, there is no provision in said chapter requiring that the place of business of a wholesaler of narcotic drugs be operated as a wholesale drug company or that duly licensed pharmacists be employed by him.



## CHAPTER XXII

### SOCIAL WELFARE

#### STATE BOARD OF PUBLIC WELFARE

March 31, 1944.—044-112.

#### APPROPRIATIONS

**QUESTION:** Should the expenses for the care of children under Section 409.03, Florida Statutes, 1941, be paid from the \$400,000.00 appropriation contained in Section 409.22, Florida Statutes, 1941, or from some other fund?

*To Honorable J. M. Lee, State Comptroller:*

In response to the above inquiry, I beg leave to state that in my opinion the functions mentioned should be paid from the \$400,000.00 appropriation referred to in Section 409.22, Florida Statutes, 1941.

February 9, 1943.—043-45.

#### AUTOMOBILES—PURCHASE

**QUESTION:** Has the State Welfare Board authority to buy and has the Comptroller authority to pay for a passenger automobile under the provisions of Chapters 20716, and 20896, Acts of 1941, or Chapter 20352, Acts of 1941?

*To Honorable J. M. Lee, State Comptroller:*

You state that Chapters 20716 and 20896 prohibit the purchase of automobiles by officers and employees of the State of Florida under certain conditions. You further state that Chapter 20352, Acts of the 1941 Legislature provides for the distribution of money received for property sold by the State Welfare Board, which was received by it through donation, gift, contribution, bequest or devise from any person, persons, or organizations when such personal property is, in the judgment of the State Board, not necessary for use in connection with the work of the State Board. You did not state, but Subsection (b) of Section 1 of said chapter provides further:

“(b) The State Welfare Board is authorized to use for public aid and social welfare purposes any moneys realized from the sale of personal property sold pursuant to the authorization hereby given; it being expressly declared to be the intention of the Legislature that such moneys are hereby appropriated to the State Welfare Board Fund and may be used by it for public aid and social welfare purposes; . . .”

You state further that the State Welfare Board recently purchased a passenger automobile which it claims it had the right to do and pay for from the proceeds of the sale of property under the provisions of Chapter 20352.

I am of the opinion that Chapters 20716, 20896 and 20352 should be read in *pari materia* since they were passed by the same Legislature and in reading said Acts in *pari materia*, if it is possible to do so, each Act should be construed so as not to conflict with the other and effect should be given to said Acts, if possible, with that idea in mind. I construe Chapter 20352 to authorize the State Welfare Board to spend the money it receives by virtue of said chapter in any manner that it may see fit for

"public aid and social welfare purposes" and that if the automobile it has purchased is for such purpose, the Board had the authority so to do and it would be in order for you to pay the same. I do not believe that Chapters 20716 and 20896, when they referred to "funds of the State of Florida," meant funds of the character that would be received by the State Welfare Board under Chapter 20352, which was from non tax sources. I think the "funds of the State of Florida" referred to in Chapters 20716 and 20896 meant funds of the State of Florida derived from tax sources.

February 16, 1944.—044-54.

#### CARE OF CHILDREN

QUESTION: May the State Welfare Board use funds for the following:

1. Children with improper guardianship, among whom shall be numbered abandoned and neglected children;
2. Destitute children;
3. Mentally defective or physically handicapped children;
4. Morally defective children?

*To the State Welfare Board, Jacksonville, Florida:*

This is to advise that Section 409.03, Florida Statutes, 1941, enumerates the classes of children referred to in your question as the dependent children for whose assistance your Board is authorized to expend funds as provided by law.

It is noted that in the statutes relating to the Florida Crippled Children's Commission, Section 391.01, Florida Statutes, 1941, defines a "crippled child" as "any person of normal mentality under the age of twenty-one years whose physical functions or movements are impaired by accident, disease or congenital deformity," and that this definition of a crippled child is broad enough to cover "physically handicapped children" referred to in the enumeration of the classes of dependent children under Section 409.03, Paragraph (3). Furthermore, said Section 409.03 and the last paragraph of Section 409.02, Florida Statutes, 1941, provide that nothing in the State Welfare Act shall preclude the Florida Crippled Children's Commission from exercising its powers and duties provided by law with regard to crippled children. This, of course, does not mean that your Board has no power to provide for physically handicapped, dependent children, but simply that the Florida Crippled Children's Commission shall continue to exercise its powers unaffected by the authority conferred upon the State Welfare Board. Unless the Florida Crippled Children's Commission is providing all of the assistance that is required for a physically handicapped dependent child, there is nothing in the statutes that would preclude your Board from making further necessary provision for such dependent child under such arrangements with the Crippled Children's Commission which will not interfere with the assistance it is rendering the child.

So long as the Crippled Children's Commission has not assumed the care of such a child, the statutes do not preclude your Board under its statutory powers from expending funds for its assistance. The State Welfare Statutes do not contemplate that dependent children shall go unassisted because of jurisdictional questions, therefore in all cases where assistance is not actually being provided for a dependent child by the Crippled Children's Commission or other public or private Children's Welfare Agency or Institution, your Board is authorized by law to expend its funds to assist such child.

Your Board is authorized to cooperate with the Florida Crippled Children's Commission and all Child Welfare Agencies, public or private, in providing for dependent children.

It should be borne in mind that the statutes delegate to the State Welfare Board the power to investigate each particular case involving a reputedly dependent child, with the further power to exercise a sound and reasonable discretion in determining if the child is actually within one of the classes enumerated in said Section 409.03 and whether the child requires assistance, and the extent of such assistance, if any. Sections 409.07 to 409.19 inclusive, Florida Statutes, 1941.

October 22, 1943.—043-280.

#### COUNCIL FOR THE BLIND—AUTHORITY TO ENTER INTO AGREEMENTS

**QUESTION:** What authority does the Florida Council for the Blind have to enter into agreements with the Federal Government for the planning and carrying out of a program of vocational rehabilitation of the blind?

*To Honorable R. Henry P. Johnson, Executive Director,  
Florida Council for the Blind, Tampa, Florida:*

Section 409.26, Florida Statutes, 1941, which established the Council for the Blind, as amended by Chapter 21779, Acts of 1943 (Paragraphs 1-7) authorizes said Council to engage in activities for the care and rehabilitation of the blind; and more specifically to "(7) Undertake such other activities as may ameliorate the condition of blind citizens of this state; (8) May cooperate with other agencies, public or private, especially the vocational rehabilitation section of the State Department of Education in carrying out any or all of the provisions of this law. (9) Make contracts and agreements with federal, state, county, municipal and private corporations and individuals . . . (10) Receive moneys or property by gifts or bequest from any person, firm, corporation or organization for any of the purposes herein set out . . ."

It is my opinion that said statute, a certified copy of which is attached hereto, grants to, and is sufficient authority for the Florida Council for the Blind to enter into agreements with the Federal Government for the planning and carrying out of a program of vocational rehabilitation of the blind.

October 11, 1943.—043-268.

#### COUNCIL FOR THE BLIND—SALARIES

**QUESTION:** Is the limitation of \$250.00 on salaries of the State Welfare Board personnel under Section 409.10, Florida Statutes, 1941, applicable to personnel of the Florida Council for the Blind?

*To Honorable R. Henry P. Johnson, Executive Director,  
Florida Council for the Blind, Tampa, Florida:*

While the Council for the Blind was established by Chapter 20714, Acts of 1941, which was an amendment to Section 18, Chapter 18288, Acts of 1937 (State Welfare Board Act), the Council operates under said Chapter 20714, as amended by Chapter 21779, Acts of 1943, as "an independent administrative governing board." It has power to "appoint all personnel as may be necessary to carry out the purposes of the Act."

Said chapters provide that the Council shall advise and consult with the State Welfare Board in the administration of assistance to the needy blind. The provision of Chapter 20714, Acts of 1941, that the duties of the Council shall be performed "under the direction of and with the approval of the State Department of Welfare" was omitted from said Chapter 21779, Acts of 1943. This, together with the further provision of Chapter 21779 that the Council shall "cooperate" with said Welfare Board,

clearly indicates legislative intention that the Council for the Blind shall operate as an agency separate and apart from the Welfare Board.

It is my opinion that the salary limitation on Welfare personnel under Section 409.10, Florida Statutes, 1941, is applicable only to the State or District Welfare Boards, and is not applicable to, nor a limitation on, the powers of the Council for the Blind under said Chapter 21779.

Your request indicates an intention by the Council to make certain salary increases. In this connection I call your attention to the provision of Section 9, Chapter 22071, Acts of 1943 (General Appropriation Act), which provides "in no event shall any sum or sums specifically appropriated for expenses be applied to salaries, except, that day labor shall be construed as coming within Necessary and Regular Expenses."

September 22, 1943.—043-255.

#### EMPLOYEES—SALARY LIMITATION

**QUESTION:** Does the salary limitation imposed by Section 409.10, Florida Statutes, 1941, apply only to salaries received from State Funds, or is it intended to apply to salaries received from either State or Federal Funds?

*To Honorable Emmett Safay, Chairman, State Welfare Board:*

Section 409.02, Florida Statutes, relating to the funds of the State Welfare Board, provides in part, "The Board shall prescribe the salary standards for the personnel employed by the state and district boards, subject to the limitations of this Chapter; . . ."

Section 409.10 provides in part, "The State Board and each District Board, subject to the provisions of Section 409.02, shall hire its own employees, prescribe their duties and fix their salaries, but the salary of no employee of the State or any District Board shall exceed two hundred fifty dollars per month."

It is my opinion that "limitations" mentioned in Section 409.02 refers to the quoted limitation in Section 409.10 and that the authority of the Board is limited, and it cannot fix any salary of any employee of the State or any District Board to exceed two hundred and fifty dollars per month, irrespective of the sources of funds from which said salary is paid.

#### OLD AGE ASSISTANCE

January 29, 1944.—044-38.

#### MANNER OF PAYMENT

**QUESTION:** May the monthly old age assistance be paid at the first of each month for the current month by the Comptroller?

*To Honorable J. M. Lee, State Comptroller:*

I hold that under Section 409.16, Florida Statutes, 1941, such may be done, not only at the first of each month but at any other time during the current month for that month when paid to the public assistance recipient for himself or herself. In making this interpretation I call your attention to Chapter 21954, Laws of Florida, Acts of 1943, and to the suggestion that under its provisions the Comptroller should set up some sort of procedure and program with the State Welfare Board concerning the payments of such assistance so as not to become involved in claims of assignees, because, having made the payment once, there is no further liability from the State to make it again.

I further call your attention to the provisions of Chapter 21848, Laws of Florida, Acts of 1943, under which a limitation of six months is placed upon the validity of these public assistance warrants.



November 18, 1943.—043-313.

#### WARRANTS—CANCELLATION AND REISSUANCE

QUESTION: 1. Is any authority given in Chapters 21848, 21954, and 22006, Acts of 1943, for the reissuing of an old age assistance warrant whose date of issuance is 1937 and whose payee died two days prior to receiving said warrant?

2. What disposition should be made of the money if said warrant cannot be reissued?

*To Honorable J. Edwin Larson, State Treasurer:*

I have examined Chapters 21848, 21954, and 22006, *supra* and in my opinion neither of said Acts authorizes the reissuance of the old age assistance warrant in question.

Chapter 21954 covers similar situations but did not become effective until June 10, 1943, and is not retroactive so as to apply to a warrant issued in 1937 to a person who died two days prior to delivery of said warrant.

Chapter 21848 limits the time within which public assistance warrants may be paid, that is, six months from date of issuance if issued subsequent to July 1, 1943. If issued prior to July 1, 1943, the warrant must be presented for payment within six months after July 1, 1943.

Chapter 22006 provides for the cancellation of State warrants if not presented for payment within six months after date of issuance. There is a discrepancy between the title of this Act and Section 1 thereof, in that the title limits the time for payment to one year from date of issuance, while Section 1 limits the time to six months. However, Section 2 of the Act authorizes the Comptroller, after investigation, to issue a new warrant upon request of the party entitled thereto. This Act therefore, does not absolutely deprive one entitled to a warrant from any rights therein when such warrant is cancelled. I believe the courts would probably uphold this Act in spite of the variance between the title and Section 1, and it is my opinion that the warrant in question here may be cancelled under Chapter 22006 and the amount thereof credited to the fund upon which it is drawn, if still operative, otherwise it should be credited to the General Revenue Fund.

It is also my opinion that the warrant in question may be cancelled and rescinded by the Comptroller under the Negotiable Instruments Law, on the ground that there has never been a complete issuance of the same, since the payee of the warrant in question died two days before receipt of said warrant, thereby making delivery of the same impossible.

#### DEPENDENT AND DELINQUENT CHILDREN

August 17, 1943.—043-223.

#### COMMITMENT—AUTHORITY; JUVENILE COURT JUDGE

QUESTION: What bearing have Chapters 21759 and 22033, Laws of Florida, Acts of 1943, on the following questions:

1. Does either of these Acts prohibit the Judge of the Juvenile Court from committing any dependent or abandoned child, subject to adoption, to a suitable family approved by the Probation Officer and Judge?

2. Does either of these Acts require the Juvenile Judge to commit every dependent child, who is believed to be a proper child for adoption, to the Children's Home or some other child placing agency?

3. Under Chapter 21759, must children now committed to fine private homes and for whom petition for adoption is ready to be filed, be removed from these homes and committed to a child placing agency before adoption can be secured?

4. Must every child, who becomes the subject of adoption, be first committed to a child placing agency and be placed by such agency?

*To Honorable Paul Kickliter, Judge, Juvenile Court, Tampa, Florida:*

These questions should all be answered in the negative.

Chapter 21759 relates to adoption of children, and while by it the State Welfare Board, for adoption purposes, is made the legal guardian of abandoned children who have not been permanently committed to a licensed child placing agency, it has no other application to any of said questions.

Chapter 22033 amends Section 415.19, Florida Statutes, 1941. The apparent purpose of said amendment is to provide a greater latitude for giving aid and protection to dependent and delinquent children by permitting their being committed to a child placing agency for the purpose of subsequent adoption (Sections 3 and 10) where a suitable home or other place is not immediately available. The necessity for this greater latitude and provision for a location of last resort appears from a reading of Section 415.17, as amended by Chapter 21895, Acts of 1943, and Section 415.28, which limits commitments to a State or County Reformatory or Institution, a suitable citizen of good moral character, a private institution or association, or a corporation not for profit.

By Section 1 of said amended Section 415.19, additional authority is given the Juvenile Judge to commit a child to a licensed child placing agency; but before entering such an order (Section 8), the Judge must determine:

"(2) that it is manifestly to the interest of such child . . . that it be permanently committed to a licensed child placing agency for adoption."

Further, said amended Section 415.19 must be construed with all other provisions and purposes of said Chapter 415, Florida Statutes, 1941 (See Sections 415.20, 415.25, 415.28). By said Chapter 415 the Juvenile Judge is vested with a great amount of discretion in effecting benefits for the child, and determining whether the child should be located with a child placing agency. Section 415.27 provides:

"This chapter shall be liberally construed to the end that the objects may be carried out, to wit: That the care, custody and discipline of a child may approximate as nearly as possible that which should be given by its parents, and in all cases where it can be properly done, the child to be placed in an approved family home, and be made a member of the family by adoption."

By Section 1, Chapter 21759 and Section 8, Chapter 22033, the State Welfare Board or licensed child placing agency serves only as an intermediary guardian without any status derogatory to subsequent adoption, and only to give necessary care and legal protection until subsequent adoption may be accomplished.

The interests of the child and subsequent adoption being the primary objectives of the Law, and such additional authority granted to the Juvenile Judge being permissive, not mandatory, said Chapter 22033 does not prohibit the Juvenile Judge from committing said child to an approved family; require a commitment of said child to a child placing agency; require the removal of children from homes to a child placing agency; or require commitment to a child placing agency before adoption.

September 21, 1944.—044-282.

#### COMMITMENT OF MINOR WHOSE EXACT AGE IS UNKNOWN

**QUESTION:** May a Judge of the Court of Record of Escambia County commit a minor, whose exact age is unknown, to the Florida Industrial School for Boys?

*To Honorable Ernest E. Mason, Judge, Court of Record of  
Escambia County, Pensacola, Florida:*

If the boy is under 17 years of age and has violated any Law of the State of Florida, he is, within the definition contained in Section 415.01, Florida Statutes, 1941, a delinquent child and as such delinquent child, this boy may be committed by you under Section 415.20, Florida Statutes, 1941, to the Florida Industrial School, provided that such commitment shall be for a definite time not to extend beyond the boy's minority and provided that while so committed such boy is subject to control of the Judge issuing the commitment (Section 415.20, supra), which Judge shall have power to discharge such child from such custody within the time of the sentence, whenever, in the judgment of such Judge, the welfare of the child would warrant it. (Section 415.20, supra).

For the term of commitment see Section 955.21, Florida Statutes, 1941.

If the boy is between 16 and 18 years of age and has been convicted, as distinguished from "violating any law of the State," he may be sentenced to the Florida Industrial School within the law governing the terms of the sentence above quoted (Section 955.20, Florida Statutes, 1941). The Board of Commissioners of State Institutions may refuse to receive a delinquent, being a child convicted of, as distinguished from one charged with, crime, sent to the Florida State Industrial School, and may authorize the Superintendent under such rules as it may prescribe, to refuse to receive such person so sentenced to said school. See Section 955.22, Florida Statutes, 1941. The boy in your case seems to be charged with, and not convicted of, crime.

My investigation of the rules of the Board of Commissioners of State Institutions discloses that there are none which extend any of the provisions of these statutory laws.

Your letter does not make plain whether the boy to whom it relates comes within Section 415.01 or within Section 955.20, Florida Statutes, 1941. There would be a difference in the power of the Board of Commissioners of State Institutions with reference to denying admission under the provisions of these two Acts. In the first case the Board would have no such power, whereas in the second, it does have the power.

September 20, 1943.—043-252.

#### CUSTODY—DEPENDENT CHILD OF SERVICEMAN

**QUESTION:** What procedure should be followed with regard to a minor, an infantile paralysis victim, who does not respond to treatment at the Crippled Children's Home and whose father is in the United States Coast Guard Service and has not made provision for her care and maintenance?

*To Honorable Terry Bird, M.D., Director of Services,  
Florida Crippled Children's Commission:*

I would recommend that you make a formal tender of the custody of the child to the father, with a demand that he accept her and provide a suitable location for her care. While I doubt that his second wife has any legal responsibility toward the child, an inquiry should also be made to see if she is willing to accept the child.

If the attitude of the father indicates that he has abandoned the child, said child may be considered dependent as defined by Section 415.01, Florida Statutes, 1941, as amended by Section 1, Chapter 21895, Acts of 1943. Any Probation Officer in the county where the dependent child was found may file before the County Judge a petition setting forth all the facts (Section 415.04) to obtain an order committing the child to some suitable State or County Institution, a citizen of good moral character, or a suitable private institution which obtains homes for dependent or neglected children as provided by Section 415.17, Florida Statutes, 1941, as amended by Section 2 of said Chapter 21895.

On the refusal of the father to provide financial support you should write to the Dependency Department, Commandant of the Coast Guard, Washington, D. C., setting out the circumstances and facts in detail, with a request that such officer take steps to see that an allotment for the child is deducted from the monthly pay of the father. An order may be obtained from the County Judge appointing a guardian to receive and expend such allotment for the benefit of the dependent child (Section 744.02, Florida Statutes, 1941).

September 2, 1943.—043-250.

#### JUVENILE COURT—JURISDICTION

QUESTION: 1. What action should be taken with dependent or delinquent girls who are wards of the Juvenile Court and who have married without permission, when the marriage proves a failure, and the girls are returned to the Court for further action?

2. Where fathers are in the armed services and are willing to make contribution to their minor children, what procedure should be followed as to the control and expenditure of allotments made by such fathers whose homes have been broken?

*To Miss Mattie H. Farmer, Judge, Juvenile Court, Orlando:*

Where your Court has once acquired jurisdiction of said girls I do not believe such subsequent marriage impairs the jurisdiction of the Court. In your discretion, you may enter an order committing said girls to: some State or County Reformatory, the care of some suitable citizen of good moral character, some suitable private institution or corporation, some child placing agency or to the Florida Industrial School for Girls, as provided by Sections 415.17, 415.20, 415.28 or 956.02, Florida Statutes, 1941.

In such cases I would further recommend that each marriage be fully investigated to see if consent of the parents was obtained as required by Section 741.04, followed by a suit for annulment if the same appears proper. If investigation discloses the marriage was not a void or voidable one, I would recommend the institution of a divorce action. Surely some assistance should be given to such minor in the settlement of her marriage difficulties. It is my understanding that the State Bar Association has an arrangement with lawyers in many counties to provide legal services where the party involved is the subject of charity and welfare administration. Funds for court costs, etc., may be made available through the Dependent Child Division of the State Welfare Department. In my opinion this would be a legitimate expense for providing assistance to said child.

If a mother is believed to be an unsuitable person to receive such allotment for a minor and refuses to join in the appointment of a guardian, a petition setting up all such facts should be filed under Sections 744.02 and 744.05 before the County Judge, seeking an order by the Court appointing a guardian.



## HOUSING AUTHORITIES LAW

January 24, 1944.—044-34.

## AREA OF OPERATION—DEFENSE HOUSING PROJECTS

**QUESTION:** May the Miami Housing Authority, created under the Housing Authorities Laws of the State of Florida, administer, for and in behalf of the National Housing Authority, a trailer camp erected in the City of Hialeah, the population of which city was 4,000 at the last census, said City of Hialeah being within ten miles of the City of Miami but being a separate municipality?

*To Mr. Emmett C. Choate, Attorney at Law, Miami, Florida:*

In connection with the above stated question, you advise that the trailer camp in question is about to be created in the vicinity of the 36th Street Air Field to take care of the necessary government employees who work at that field, and that the nearest desirable facilities are located within the boundaries of the City of Hialeah, which city has no Housing Authority.

Section 421.03, Florida Statutes, 1941, defines the "area of operation" of a Housing Authority as follows:

"'Area of operation' . . . In the case of a housing authority of a city having a population of twenty-five thousand or more, shall include such city and the area within ten miles from the territorial boundaries thereof; provided however, that the area of operation of a housing authority of any city shall not include any area which lies within the territorial boundaries of some other city as herein defined."

The foregoing definition undoubtedly limits the field of operations of Housing Authorities. However, it is my opinion that this limitation is only with reference to housing projects as defined in Paragraph (9) of Section 421.04, Florida Statutes, 1941, which have been declared to be necessary by the governing body of the city under Section 421.04, (a) because of insanitary or unsafe inhabited dwelling accommodations existing in such city, or (b) because there is a shortage of safe or sanitary dwelling accommodations in such city available to persons of low income at rentals they can afford.

The "area of operation" definition contained in Section 421.03, supra, does not apply where the activity is in connection with a "defense housing project" as defined in Section 421.44, as amended by Chapter 21697, Laws of Florida, Acts of 1943.

The trailer camp project mentioned in your request is a defense housing project and the "area of operation" definition applicable to such project is found in Section 1, Chapter 20249, Laws of Florida, Acts of 1941, wherein it is provided that in the development or administration of defense housing projects a Housing Authority of a city "may exercise its powers within the territorial boundaries of said city and an area within ten (10) miles from said boundaries, excluding the area within the territorial boundaries of any other city which has heretofore established a Housing Authority."

Thus, if the City of Hialeah has not "heretofore established a Housing Authority," the Miami Housing Authority would not be excluded from exercising its defense housing powers within so much of its 10 mile area as lies within the territorial boundaries of the City of Hialeah.

I call your attention also to Sections 7 and 8, of Chapter 20221, Laws of Florida, Acts of 1941 (See Sections 421.43 and 421.44, Florida Statutes, 1941), which in my opinion authorize Housing Authorities to act as agents for Federal Agencies in the management, operation and maintenance of defense housing projects.

In view of the statutes hereinbefore referred to, and in the light of the facts set out in your request, it is my opinion that your question should be answered in the affirmative.

## CHAPTER XXIII

### LABOR

#### WORKMEN'S COMPENSATION LAW

January 15, 1943.—043-17.

##### CAFETERIAS OPERATED BY PTA AND COUNTY BOARDS

**QUESTION:** The cafeterias of the Board of Public Instruction of Dade County are operated under the direction and primary supervision of the several Parent Teacher Associations of the several schools of the county, but through its director of home economics the Board of Public Instruction in a secondary manner undertakes the general supervision of all the cafeterias throughout the county system. These cafeterias are operated on a nonprofit basis.

Do the cafeterias and the salaried employees thereof come within the meaning of the Workmen's Compensation Act, and, if so, is it the responsibility of the Board of Public Instruction to maintain the Workmen's Compensation Insurance upon all such cafeterias throughout the county system, or should each cafeteria severally assume its own responsibility and maintain its own insurance?

*To the Florida Industrial Commission:*

I have obtained certain information from the Attorney for the County Board of Public Instruction of Dade County, which clearly shows joint control over the employees of these cafeterias by the Parent Teacher Associations and the County School Board. The County School Board employs a Supervisor of Home Economics in lunchrooms or cafeterias, and through this employee, together with the Executive Board of the Parent Teacher Association, employs the lunchroom manager, who in turn employs and discharges the other help and employees of the cafeterias on the approval of the Parent Teacher Association's Executive Board and the said Supervisor. The hours of work are determined by the Parent Teacher Association's lunchroom manager and the County School Board's Supervisor of lunchrooms. These likewise determine the salaries or wages to be paid such employees. Food and operating expenses are paid by receipts from the lunchroom, and all heavy duty equipment is furnished by the County School Board.

The Workmen's Compensation Act, in defining "employer," states that the term means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and local representatives of a deceased person or the receiver or trustee of any person.

While the County School Board may not be a "political subdivision" within the true intent and meaning of that term, nevertheless, in my opinion, it is a political entity, and certainly is a "quasi-public corporation," and therefore, in my opinion, subject to the terms of the Workmen's Compensation Act.

It is further my opinion that the cafeterias referred to and the employees thereof are within the meaning of the Workmen's Compensation Act, and such employees are entitled to the benefits thereof.

The cafeterias you describe appear to be joint enterprises between the Board of Public Instruction referred to and the several Parent Teacher Associations involved, with no apparent certainty as to which of the two

interested therein is the real employer. In this connection, it appears to be the general rule that, where it is uncertain which of two or more interested in a joint enterprise is the employer, all are liable.

It is, therefore, my opinion that, while the Board of Public Instruction may be liable as an employer with reference to all of the cafeterias, the individual Parent Teacher Association is liable only with respect to the cafeteria it operates. Therefore, it would appear that the proper procedure would be for the Board of Public Instruction, in conjunction with each Parent Teacher Association, to provide the necessary insurance for each cafeteria involved.

March 24, 1944.—044-97.

#### INDUSTRIAL COMMISSION—DESTRUCTION OF RECORDS

QUESTION: Has the Florida Industrial Commission authority to destroy old and useless records?

*To Honorable Allen Clements, Director, Workmen's Compensation Division, Florida Industrial Commission:*

While the Workmen's Compensation Act does not expressly provide that the Florida Industrial Commission shall make or keep records, by implication at least, the Commission has this power by reason of the necessity for making and keeping records.

In my opinion, if the keeping of these records by the Florida Industrial Commission is necessary in the administration of the above Act, the requirement for maintaining such records is in my opinion just as imperative as though the Act specifically required the records to be kept. If the Act specifically required the records to be kept, in the absence of express authority of law to destroy such records which had become old and useless, I would hesitate to advise you that they might be destroyed. By like reasoning, I cannot advise you that the Florida Industrial Commission has the power to destroy such records which have become old and useless.

Chapter 20866, Acts of 1941, is an Act which provides for the photographic reproduction of records, Section 1 of which is as follows:

1. Photographic reproductions made by any Federal, State, County or Municipal governmental board, department or agency, in the regular course of business, of any original record, document, paper or instrument in writing, which is, or may be, required or authorized to be made or filed or recorded with said board, department or agency shall in all cases and in all courts and places be admitted and received as evidence with a like force and effect as the original would be, whether said original record, document, paper or instrument in writing is in existence or not."

Even were it feasible for photographic reproductions to be made and kept of the records in question, I still would hesitate to advise you that you could make such reproductions and destroy the originals by virtue of said Chapter 20866.

It is suggested that the safe way to cope with this matter is to obtain statutory authority during the next session of the Legislature for the destruction of these records.

February 18, 1943.—043-47.

#### INSURANCE—PURCHASE BY PAROLE COMMISSION

QUESTION: Should the Florida Parole Commission carry workmen's compensation insurance in connection with the operation of its office, both in the Capitol and in the districts?

*To Honorable Francis R. Bridges, Jr., Chairman, Florida Parole Commission:*

Under the Workmen's Compensation Law, "the term 'employment' includes employment by the state and all political subdivisions thereof, . . ." Section 440.02(1), Florida Statutes, 1941; and "the term 'employer' means the state and all political subdivisions thereof, all public or quasi-public corporations therein, every person carrying on any employment, . . ." Section 440.02(4).

The Act further provides: "Every employer shall secure the payment of compensation under this chapter—(a) By insuring and keeping insured the payment of such compensation with any stock company, mutual company or association or exchange, authorized to do business in the state, . . ." Section 440.38(1), and "The state, its board, bureaus, departments and agencies and all its political subdivisions who employ labor shall be deemed self-insurers under the terms of this chapter unless they elect to procure and maintain insurance to secure the benefits of this chapter to their employees and they are hereby authorized to pay the premiums for the said insurance." Section 440.38(5).

It is my opinion that the Florida Parole Commission may carry workmen's compensation insurance in connection with the operation of all departments of the Commission. However, whether you elect to purchase workmen's compensation insurance or retain the status of "self-insurer" is a matter of policy to be determined by the Commission.

September 10, 1943.—043-238.

#### OPERATOR OF VENDING STAND—EMPLOYEE; FLORIDA COUNCIL FOR THE BLIND

QUESTION: 1. Is the operator of a vending stand established by the Florida Council for the Blind in a public building considered as an employee in the sense that the Council may be liable under the Workmen's Compensation Laws of the state, or considered as an independent contractor not subject to said laws?

2. Is the Council required to make deductions from the earnings of the operator for the purpose of paying the Federal Income Tax?

*To Honorable R. Henry P. Johnson, Executive Director,  
Florida Council for the Blind, Tampa, Florida:*

1. In *Magarian vs. Southern Fruit Distributors, et al*, 1 So. 2nd 858, the Florida Supreme Court said "that no hard and fast rule may be stated to control the determination of the question as to whether one occupies the status of an employee or that of an independent contractor and that each case must stand on its own facts," and cited with approval the statement that "the test of what constitutes independent service lies in the control exercised, the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done."

If the Council was interested only in the results of the work and not the means whereby it is to be accomplished, the operator might be classed as an independent contractor. However, there is nothing in the service by the operator which may be considered independent employment.

From the copy of agreement with the operator it appears that the Council obtains the location and provides the vending stand equipment and stock, which is represented as being owned and operated by the Council. The Council determines net profits, retains 10% for maintenance, depreciation, supervision and other purposes, and pays 90% to the operator to operate the stand according to directions and regulations of the Council as to the kind of merchandise, prices, records to be kept, etc., all under supervision of the Council, and the operator is subject to dismissal without notice. The Council has complete control over every feature of the operation of the stand.



It is my opinion that the operator of such vending stand is an employee of the Council and entitled to the benefits of the Workmen's Compensation Law.

Provision in the agreement that "for the purposes of this contract it is understood and agreed that the operator is an independent contractor" does not change the status of the parties. As stated in the Magarian case above cited, "the parties evidently thought they did not stand in the relationship of master and servant, but as a matter of law, they did so stand, their mistake in this regard did not change the status." The only way an employer can avoid the provisions of the Workmen's Compensation Law is to exercise and elect not to accept the same, and post notice of nonacceptance thereof, as provided by Section 440.05, Florida Statutes, 1941.

2. Public Law 68 of United States 78th Congress—Current Tax Payment Act of 1943—provides by Section 1622 in part "(a) Requirement of Withholding—Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to the greater of the following: . . ."

It is my further opinion that for the purposes of this law the operator should also be considered as an employee and the 90% net profit considered as his wages, and that the Council should make the deductions for payment of the Federal Tax as required by said Public Law 68.

#### UNEMPLOYMENT COMPENSATION LAW

August 10, 1944.—044-236.

##### EMPLOYEE WITH TWO OR MORE EMPLOYERS

QUESTION: When an employee performs services for X Corporation, Y Corporation and Z Corporation, and receives from each a salary of \$3,000 per annum, which corporations are "employers" under the Unemployment Compensation Law by reason of ownership and control as provided in Section 443.03 (7) (d), Florida Statutes, 1941, as amended by Chapter 21983, Acts of 1943, is each of said corporations required to pay unemployment compensation contributions on amount so paid said employee?

*To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:*

Section 443.03 (7) (d), Florida Statutes, 1941, provides that any employing unit which together with one or more employing units is owned or controlled directly or indirectly by the same interests or by husband and wife or which owns or controls one or more other employing units or the majority of the voting stock of one or more corporations, and which if treated as a single unit with such other employing unit or interest or both would be an employer as defined in said Section 443.03 (7) (a), is an employer.

It seems that the effect of said provision is to bring under the above law an employing unit which, but for said provision, would not be affected by such law. But having been brought under the law thereby, such employing unit and such other unit or units united by such ownership or interest by operation of said Section 443.03 (7) (d), in my opinion are separate employers, each occupying the same status with respect to its employees as any other employer as defined in the law.

In view of the foregoing conclusions, it is my opinion that each corporation mentioned in the above question is required to pay contributions with respect to the salary paid said employee mentioned. It is noted that wages paid an employee by any single employer during a calendar year in excess of \$3,000 are not subject to contributions under the law.

October 30, 1944.—044-315.

#### EMPLOYEES, PUBLIC—DEFINITION

**QUESTION:** Is the State Chairman of the Florida War Finance Committee a "public employee" to whom the Florida Industrial Commission may furnish the identity of employers from its records, within the meaning and purpose of Section 443.12, Subsection (7), as amended by Section 4, Chapter 21982, Acts of 1943 (being a part of the Florida Unemployment Compensation Law)?

*To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:*

The pertinent part of said noted provision of the Florida Unemployment Compensation Law is as follows:

"Each employing unit shall keep true and accurate work records, containing such information as the Commission may prescribe. Such record shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. The Commission, the Board of Review, or an Appeals Referee may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which any of them deem necessary for the effective administration of this Chapter. Information thus obtained, or obtained from any individual pursuant to the administration of this Chapter, shall, except to the extent necessary for the proper presentation of a claim, be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the individual's or employing unit's identity, but any claimant (or his legal representative) at a hearing before an Appeals Referee or the Board of Review shall be supplied with information from such records to the extent necessary for the proper presentation of his claim."

In view of the meaning and intent of said quoted provision of law, it is my opinion that the State Chairman of the Florida War Finance Committee is not a "public employee" to whom the mentioned information may be made available, as contemplated by said law; and, hence, that such question is properly answered in the negative.

March 2, 1943.—043-60.

#### EMPLOYEES; WAGES—IMPOSITION OF STATE TAX

**QUESTION:** May a state tax be imposed in Florida upon wages paid to employees to be borne by such employees for the purposes of the Unemployment Compensation Law?

*To the Florida Industrial Commission:*

While I do not like to render an official opinion upon the constitutionality of a proposed law, it would appear that a state tax in Florida upon wages of employees, to be paid by the employees themselves or deducted from their wages, would constitute an income tax and violate the provisions of Section 11, Article IX, of the Constitution of the State of Florida, and our Supreme Court has on numerous occasions struck down taxes of a somewhat similar nature on that ground.

December 28, 1943.—043-340.

**INDUSTRIAL COMMISSION—EXAMINATION OF EMPLOYERS' BOOKS**

**QUESTION:** 1. Under the authority contained in Section 443.12 (1), (7), (8), and (9), of Florida Statutes, 1941, as amended by Section 4 of Chapter 21982, Laws of Florida, Acts of 1943, may the Industrial Commission through its authorized representatives require the production of records by an employing unit before such representative in some county other than the county in which the employing unit or individual having charge of such records resides?

2. Where voluminous records have been produced in obedience to a subpoena as above authorized, may they be retained in the possession of the Commission and its agents, not to exceed a reasonable time, for audit and examination thereof, but for more than a single day, that is, must they be left in the possession of the Commission by the owner of such records?

3. Is the Commission authorized to transport records, as contemplated above, from some county where they have been produced to another county where the Commission maintains an office, for the purpose of completing its review of such records?

*To Honorable B. A. Williams, Chairman, Florida Industrial Commission:*

In answer to your first question, I do not find any provision of law that would empower the Industrial Commission, through its authorized representative, to require an employer to produce his records before such representative in some county other than the county in which such employer's business is situated.

In my opinion, the second question posed by you should be answered in the affirmative. It would be a useless procedure to require the production of an employer's books and records for examination if such records could not be retained by the Commission's representative for a reasonable length of time for audit and examination. Whenever an employer produces before such representative his original records for inspection and examination, and requests leave to withdraw the same and substitute true and correct copies thereof, it is my opinion that such substitution must be permitted so that the orderly function of the business will not be unduly retarded.

The third question posed by you should, in my opinion, be answered in the negative insofar as the question contemplates the transporting of an employer's original record. However, when an employer has tendered in evidence copies of his original records, or when the representative of the Commission prepares copies of such records, such copies may be transported by the Commission or its agent to its field office located within some other county.

June 1, 1944.—044-169.

**PRACTICE BEFORE COMMISSION—REGULATION**

**QUESTION:** 1. Does the practice of representing another before the Florida Industrial Commission constitute the practice of law, and if so, does that apply only to actual hearings and arguments before the Commission or to all steps leading to such hearings?

2. Did the Commission have power to enact the regulations hereinafter mentioned concerning appearances before it, or are such matters regulated by statute concerning the practice of law?

3. What power does the Commission have to refuse to consider matters presented to it by persons other than the employer involved or his duly qualified attorney?

*To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:*

The Florida Industrial Commission, in the administration of the Florida Unemployment Compensation Law, has adopted rules and regulations concerning procedure before it, under power granted by Section 443.12 (1) (3), Florida Statutes, 1941, as amended. With reference to rate of contributions of an employer (Section 443.08), the Florida Industrial Commission adopted Section 6 of the Florida Unemployment Compensation Code of regulations which, in part, is as follows:

"6.10 Hearings in Chargeability of Benefit or Rate of Contribution Cases: . . . (d) Appearances: (1) Any individual may appear for himself in any proceeding before the Commission. Any partnership may be represented by any of its members. Any corporation may be represented by any officer or employee thereof provided, however, that any employer may be represented by any bona fide employee of said employer whose duty it may be to keep books and records pertinent to employment records required by the Commission for employment. (2) Any employer may appear by an attorney at law admitted to practice law in the State or Florida or admitted to practice before the highest court of any State or Territory of the United States."

With reference to assessments against delinquent employers and protests thereof (Section 443.15), the Florida Industrial Commission adopted Section 13 of the Florida Unemployment Compensation Code of regulations which, in part, is as follows:

"13.1 Form of Protest: . . . (c) Such protest shall be signed by the employer, his agent, or attorney."

"13.2 Procedure on Protest: (a) Upon the receipt of protest of assessment, the general counsel shall set a hearing upon the same and shall immediately notify the employer, his agent, or his attorney, of the place, date and time of hearing. . . . (e) Testimony taken at such hearing shall be reduced to writing and the transcript thereof shall be certified to and signed by the special deputy conducting such hearing, which transcript shall be presented to the Commission by said special deputy, together with his recommendations thereon. A copy of said transcript shall be forwarded to the employer or his attorney, if represented by counsel at such hearing, by the said special deputy. . . . (f) If the employer desires oral argument before the Commission upon the issues involved he shall, within ten (10) days of the mailing of said transcript to him at the address stated in the original protest, or to the attorney representing him, submit to the Commission application in writing for hearing before the Commission for the purpose of presenting argument upon the protest and the transcript of the testimony."

Section 443.12, Subsections (1) and (2), Florida Statutes, 1941, sets forth the powers of the Commission with respect to its rules and regulations.

Section 443.16 (2), Florida Statutes, 1941, provides that any individual claiming benefits under the law may be represented before the Commission or a court by counsel, or agent, or other duly authorized agent. There is no provision in the Unemployment Compensation Law with respect to representation of employers. Section 39.23, Florida Statutes, 1941, prescribes a penalty if one practices law without being licensed as in such section provided. Our statutes do not define "practice of law."

Contributions payable under the Unemployment Compensation Law are taxes. The law prescribes the method whereby the rate of such tax with respect to each employer is fixed, the payment thereof, and means of enforcement. The Commission is the body charged with administration of the law. Our Supreme Court has never characterized the nature of the Commission as a tribunal in its administration of this law. How-



ever, in the case of South Atlantic S. S. Co. of Delaware v. Tutson, et al. (Fla.) 190 So. 695, our Court held that the Workmen's Compensation Law does not confer upon the Commission "judicial power" as contemplated by Article V, Florida Constitution, as amended in 1914, and that such Commission with respect to such law is essentially an administrative body. It seems the same may be said with regard to administration by the Commission of the Unemployment Compensation Law. The fact that the Commission, in the above mentioned proceedings, conducts investigations and hearings preliminary to action on its part, does not characterize such action as judicial. *Printis v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 33 L. ed. 150, 29 S. Ct. 67. In Section 443.11, Florida Statutes, 1941, the Commission is referred to as an "administrative unit." There is no requirement in this law that the members of the Commission shall be lawyers. Furthermore, the proceedings mentioned in your letter may not appear in the Judicial Department of the State government as a judicial case unless and until they are brought to the Circuit Court for review. *South Atlantic S. S. Co. v. Tutson*, supra.

The statutes setting up administrative bodies frequently provide that they shall have the power to prescribe rules of practice and procedure for the conduct of business before them. But in the absence of such provisions an administrative body has implied power to devise its procedure in ascertaining the facts on which it is to act or decide. The rules must be reasonable and not arbitrary. It is noted that practically every Federal Bureau, Board and Commission has prescribed either rules of practice or regulations governing the admission of persons practicing before it. 42 Am. Jur. 447, Section 115.

In view of the foregoing, in my opinion your questions are properly answered as follows:

1. The representation of an employer in the proceedings mentioned by you before the Commission does not constitute the practice of law.
2. The rules set forth in your letter and designated 6.10(d) (1) and (2) were and are within the power of the Commission to make.

The rules set forth in your letter designated 13.1(c) and 13.2(a), (e) and (f) appear to need clarifying. The "protest" mentioned may be signed, among others, by an "agent" of an employer; notice of hearing shall be sent such "agent"; but the representation of an employer at the hearing by indirection seems limited to the employer or his attorney. If it is the desire of the Commission that the same rules with respect to representation of employers in the proceedings referred to in above 6.10 be applicable to the proceedings referred to in 13.1 and 13.2 above, it is suggested the latter rules be made more specific. It is further suggested that with respect to appearances before the Commission the rules be uniform as to all proceedings.

3. In view of the answers to the first and second questions, answer to the third seems unnecessary.

April 29, 1944.—044-141.

#### REFUNDS—ADJUDICATION AND PAYMENT

**QUESTION:** Where unemployment compensation contributions have been collected by the State, from an alleged employer, when in fact no relation of employer and employee existed, the relation being that of independent contractors, is it appropriate or advisable for the State to make refund of these contributions collected and paid into the Florida Unemployment Compensation Fund, without requiring a court order settling the rights of the parties?

*To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:*

A Florida Corporation, hereinafter called the Company, became an alleged employer under the provisions of the Unemployment Compensation Act (Section 3, Chapter 18402, Acts of 1937), and was subject to payment of taxes pursuant to the provisions of Title IX of the Federal Social Security Act, subsequently the Federal Unemployment Tax Act. The Company, in its operations, distributed certain of its products through bulk station operators who, by the Bureau of Internal Revenue, were ruled to have been employees of the Company and not independent contractors, and the Company was required to pay the tax under Title X of the said Social Security Act upon the remuneration paid these bulk station operators and their employees.

It appears that, with respect to the Federal Act, the Bureau of Internal Revenue ruled in 1938 (N. 325-SST-290) that such bulk station distributors of oil companies on a commission basis were "employees" under the Federal Act; and again on December 18, 1941, set forth a further interpretation (529-Minn. 5302) to the effect that, despite the fact that in the cases of *The Texas Company vs. Higgins*, 118 Fed. 2d 636, and *Indian Refining Co. vs. Dallman*, 119 Higgins, 118 Fed. 2d 417, two bulk plant agents were held not "employees" of such respective companies, yet the Bureau of Internal Revenue declared it adhered to its ruling published as S.S.T. 290, Cumulative Internal Revenue Bulletin 1938-1, page 414, with respect to bulk plant agents.

The period during which the contributions mentioned in your inquiry were paid by the Company is covered by the provisions of Chapter 18402, Acts of 1937, as amended by Chapter 19637, Acts of 1939. Since, as stated above, it appears that the government still maintains that such bulk station operators are "employees" within the meaning of the Federal Act, in my opinion the above finding of the Circuit Court of Appeals does not exclude such operators as "employees" under the Federal Act within the meaning of Section 3-E-VI (i) of both said Chapters 18402 and 19637.

Our Supreme Court has held that the Florida Unemployment Compensation Act uses the words "employ" and "employer" in their ordinary sense and recognizes the status of "independent contractor" to be that of the common law, so that an "independent contractor" is not an employee under the Act. *Gentile Brothers Co. v. Florida Industrial Commission*, et al. 10 So. 2d 568. And when, in another case, it was contended before the Court that the definitions of "employment" and "wages" as used in the Florida Act enlarged upon the common law concept of master and servant, the Court held that neither the history of the a-b-c provisions (Section 3-E-V of the Florida act) nor the accepted canons of construction supported this contention. *Florida Industrial Commission v. Peninsular Life Insurance Co.*, 10 So. 2d 1093.

Neither of these cases dealt with bulk station distributors of oil companies; yet in view of the holding of our Court in these cases I am of the opinion that if bulk station distributors under the circumstances of their relationship with their respective oil companies, are "independent contractors" as comprehended by and defined in the two Florida cases above cited, they are not employees within the meaning of the Unemployment Compensation Law of Florida.

However, since our Supreme Court has made no specific ruling with respect to such bulk station operators, and since it appears that other companies, as well as the above mentioned Company, are similarly situated with respect to such bulk station operators, and in view of the amounts of possible refunds involved, in my opinion the safe course to pursue with respect to all such companies will be to establish by appropriate proceedings in court whether or not such refunds are payable and,

if so, the amounts thereof. It seems that the possible amount of refund to said Company is between \$20,000 and \$25,000, and possible amounts involved with respect to all these companies may total between \$200,000 and \$300,000. Under the circumstances stated I feel that it is advisable that refunds, if they are payable, be paid pursuant to court order.

November 19, 1943.—043-314.

#### TAX WARRANT—COSTS; POSTING OF BOND; RECORDING

QUESTION: 1. Is a Sheriff authorized by law to require the Florida Industrial Commission to post a cash deposit for services to be performed in connection with the execution of a state tax warrant issued pursuant to the provisions of Section 443.15, Florida Statutes, 1941, Paragraph (3) (a)?

2. When the Industrial Commission has properly issued its warrant for delinquent taxes, delivered the same to the Sheriff for execution thereof, and caused a copy thereof to be recorded in the office of the Clerk of the Circuit Court, and thereafter the debtor named therein sells the motor vehicle subject to the lien of said warrant, may the Commission be required to post a bond to protect the Sheriff in connection with levy on such motor vehicle in the possession of someone other than the debtor in the warrant?

3. In the case of a motor vehicle, and of other personal property, is a purchaser who acquired from the delinquent tax payer subsequent to the recording of the Commission's warrant and the perfecting of its lien against such property, an innocent purchaser?

*To Honorable Boyce A. Williams, Chairman, Florida Industrial Commission:*

The first question posed by you is undoubtedly subject to solution by whole-hearted cooperation between the Florida Industrial Commission and the officer involved. In the past this office has experienced no difficulty in cooperating with and obtaining in turn the cooperation of Sheriffs in the matter of service of process that was issued at the request of this office. This spirit of cooperation was and is based upon my assurance to the Sheriff requested by me to serve process, that his statement for services rendered would be immediately approved upon receipt and placed in order for payment. I feel that if your Commission will follow this policy you will experience no difficulty in obtaining the cooperation of the Sheriffs of this state.

The second question posed by you is answered in the negative. There is no statute of which I am advised that either authorizes or requires the State or any of its agencies to execute a bond conditioned to relieve a Sheriff from liability for loss that anyone might sustain by reason of his levying upon property in obedience to a lawful writ.

The third question posed by you is answered in the negative. The provisions of Section 443.15 (3) (a), Florida Statutes, 1941, are applicable. It is therein provided that upon a copy of the Commission's warrant being recorded by the Clerk of the Circuit Court of a county, the amount of money for which such warrant was issued

"shall become a lien upon the title to an interest, whether, legal or equitable, in any real property, chattels, real or personal property of such employer against whom such warrant is issued in the same manner as a judgment duly docketed in the office of such Circuit Court Clerk with execution duly issued thereon and in the hands of the sheriff for levying. . . ." (Emphasis supplied).

It is my opinion that the lien created in favor of the Commission upon the real and personal property of an employer who has failed to make payment of contributions as required by the Unemployment Compensa-

tion Law is not of that character of liens described in Section 319.15, Florida Statutes, 1941, wherein provision is made for recording, in the office of the Motor Vehicle Commissioner, a notice of the existence of a lien upon a motor vehicle for unpaid purchase price or lien given as security for a debt.

July 21, 1943.—043-175.

#### TAXES, DELINQUENT—NONRESIDENT TAXPAYER

**QUESTION:** In which court should the Florida Industrial Commission institute proceedings for the collection of delinquent unemployment compensation taxes from a nonresident who incurred the obligation to pay such taxes while transacting business in this state?

*To the Florida Industrial Commission:*

Your request has received careful and prolonged consideration in an effort to avoid the general rule that no court outside a state will enforce the revenue loss of such state.

In the case of *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265, the Supreme Court of the United States recognized the rule that the courts of no country will execute the penal laws of another, and extended this rule to all suits in favor of a state for the recovery of pecuniary penalties for any violations of statutes for the protection of its revenue or municipal laws, and to all judgments for such penalties.

I, at first, thought that perhaps the delinquent nonresident involved in your request probably had appointed a resident agent here for the service of process, and that you could, by serving such agent, prosecute a suit against such delinquent nonresident here in our State Courts. However, the rule announced in the case of *Wisconsin v. Pelican Insurance Company*, supra, is to the effect that a judgment of that sort would not be enforceable in courts outside the state where the tax laws in question were operative.

The facts in your present problem are somewhat different, however, from the facts in the cases following the ruling in the *Wisconsin* case. Here the delinquent nonresident was actually operating in this state when the tax obligation was incurred, and there is no effort to extend the territorial scope of our revenue laws.

Then too, the tax involved here is one levied for a beneficent purpose, that is, to relieve and decrease the evils of unemployment. It is to a certain extent an integral part of a national scheme to bulwark the nation against economic chaos resulting from widespread unemployment. For this reason and the one above mentioned, it might be a good test case to use as an experiment in establishing the same method for collecting such taxes from delinquent taxpayers who have withdrawn from our state.

I believe it would be a good idea to ascertain whether or not the delinquent nonresident in question has appointed a resident agent for the service of process in this state, and if he has, then proceed to institute suit in our State Courts, reduce the claim to judgment, attempt to enforce it then in the courts of the sister state, and take it to the Supreme Court of the United States, if necessary, to test out the questions involved. If service cannot be obtained in this manner, then I believe I would attempt to secure leave to file suit direct in the United States Supreme Court and test the question there. It is my opinion that in the collection of such tax, the Florida Industrial Commission would be synonymous with the State of Florida.



June 15, 1944.—044-172.

### TRANSFER OF EMPLOYMENT RECORD

QUESTION: 1. "A" operated a business, as sole owner, for three or more years, after which he formed a partnership of equal interests with "B." This partnership, after operating for some time, was dissolved by the sale of "A's" interest to "B." Under the provisions of Section 443.08, Florida Statutes, 1941, for experience rating purposes,

(1) Is the partnership entitled to a transfer of the employment record from "A"; and,

(2) Is "B" entitled to a transfer of said employment record from the partnership; and, if so, is the transfer only

(a) For the actual period of operation by the partnership as such, or,

(b) For the combined period of the operation by "A" as sole owner and the period of operation by the partnership?

2. If "A's" record aforesaid is transferred to the partnership, would "A" be entitled to use his individual record upon the resumption of operations as an employer subsequent to his withdrawal from the partnership?

*To Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:*

We interpret Section 443.08(3) (h), Florida Statutes, 1941, as allowing a transfer of the employment record from "A" to the partnership composed of "A" and "B." We take the position that Paragraph (2) of Subsection (h) requiring substantially the same interest in both, is met where at least 50 per cent of the ownership and control in the successor existed in the immediate predecessor. Said Section 443.08(3) (h) provides:

"(h) For the purpose of this subsection two or more employers who are parties to a transfer of business or the subject of a merger, consolidation, or other form of reorganization effecting a change in legal identity or form, shall be deemed to be a single employer and shall be considered as one employer with a continuous employment record if the Commission finds that—

"1. Immediately after such change the employing enterprises of the predecessor employer or employers are continued solely through a single employer as successor thereto, and

"2. Immediately after such change such successor is owned or controlled by substantially the same interests as the predecessor employer or employers, and

"3. The predecessor employer or employers have ceased to do business in the State of Florida and have given consent in writing to such transfer of employment record, and

"4. The successor employer has assumed liability for all contributions required of and due from the predecessor employer or employers; provided, however, that the above authorization for transfer of employment records shall be applicable only with reference to the computation of the benefit ratio for the taxable year commencing January 1, 1944, and thereafter."

Section 443.08 (3) (j), Florida Statutes, 1941, provides that the Commission shall notify the employer of his contribution rate for each calendar year and for the finality of such rate for such calendar year. Section 443.09 (1), of said statutes, provides that any employing unit which is or becomes an employer in any calendar year remains and continues to be an employer throughout such calendar year.

A clear understanding of the questions here involved requires reference to Section 443.08(3). It is noted that Section 443.08(3) of the Unemployment Compensation Law, Florida Statutes, 1941, as amended, pro-

vides for variations in contribution rates of employers required by the provisions of said law. The above section contains subdivisions and paragraphs providing (a) that contribution rates shall be based on benefit experience of the particular employer and requiring the charging of benefit payments to eligible individuals to the employment record of the former employer or employers of such individual; (b) that the Commission shall compute a benefit ratio for those employers whose records have been chargeable during a specified period; (c) that the standard rate of contribution shall be 2.7 per cent; (d) that employers shall be eligible for rate variations from the standard rate of contributions, only if their employment records have been chargeable with benefit payments for a specified period; and (e) for the transfer of the employment record of an employer to a successor employer and the treating of both the predecessor's or predecessors', and the successor's record as one continuous employment record as provided by the above Section 443.08(3) (h).

Of the conditions which must exist to effect transfer of an employment record, Section 443.09(3) (h), the second appears to be the most confused as to meaning. The answers to the above questions seem to depend upon the construction to be placed on the wording "is owned or controlled by substantially the same interests as the predecessor employer or employers."

A search of legal authorities evidences that the words "substantial" and "substantially" are not necessarily similar in meaning. A "substantial interest" does not of necessity connote a controlling interest. On the other hand, "substantially" as used in the above sentence, giving to it the accepted definition when used in such connection, means "essentially," or "in the main," or "approximately," as distinguished from "identically." Employing the word "substantially" with such meaning in the above-quoted sentence, any partnership which took over a business theretofore operated by "A" would possibly have to be one wherein "A" held more than a controlling interest, to authorize the transfer of "A's" employment record to the partnership. Such would be a rather literal construction and application of the term "substantially." In view of the Unemployment Compensation Law and the purpose this provision thereof was intended to serve, it is felt the word as here used is susceptible to a more liberal construction.

It seems that you heretofore have interpreted and applied the term to permit transfer of an employment record in an instance where the predecessor employer's interest in a partnership taking over a business is as much as fifty per cent. While it is considered that such interpretation is most liberal, it does not appear to be in conflict with the apparent intent of this feature of the law.

It is further pointed out that the record of a predecessor employer does not follow the enterprise; it follows the original "interest" with respect to ownership or control of the enterprise affected. It would seem, therefore, that as long as the original interest or interests substantially own or control the enterprise, transfer of employment record is permitted, provided the other conditions of the law are met.

Based upon these conclusions, it is, therefore, my opinion that your questions are properly answered as follows:

1. The partnership of "A" and "B" would be entitled to a transfer of "A's" employment record.

2. Upon "B's" purchasing "A's" interest in the business, he would be entitled to have transferred to him the employment record of the partnership to the extent that such record pertained to actual operations of the partnership, excluding "A's" individual record.

3. (a) Were "A" to purchase "B's" interest in the partnership, he would be entitled to transfer of the employment record of the partnership, including "A's" prior individual record.

(b) Were "B" to purchase "A's" interest in the partnership and then immediately thereafter were "A" to engage in an individual enterprise, "A" would not be entitled to his previous individual employment record.

Each of the answers above is subject, of course, to compliance by interested parties with the other requirements and conditions of said Section 443.08 (3) (h).

### GENERAL LABOR REGULATIONS

March 21, 1944.—044-88.

#### CITY EMPLOYEES—UNIONS

QUESTION: 1. Has the City of Miami authority to enter into collective bargaining agreements with trade unions or their agents?

2. Is it against public policy for city employees to belong to a trade union?

*To Honorable A. B. Curry, City Manager, Miami, Florida:*

The City Attorney of Miami issued an opinion under date of November 27, 1943. The City Attorney's office ruled that House Bill No. 142 of the 1943 Legislature (Chapter 21968) is a general act and is not applicable to municipal corporations; that "section 90 of the Charter of the City of Miami, which is a Special Act, prescribes that: 'The City Manager shall fix the number of salaries or compensation of all other officers and employees.'" He also held that: "It is a fundamental law that a General Act does not repeal a Special Act and, therefore, Section 90 of the Charter of the City of Miami, aforesaid, is still in force and effect, and the City Manager of the City of Miami can not delegate his authority to fix the compensation of all City employees, excepting the City Manager, the heads of departments, the Municipal Judges and the City Clerk, and such authority is wholly discretionary and not controlled by law, or bargaining agents of Labor Associations."

With this opinion I thoroughly concur. However, there is a question which I feel far exceeds and transcends the one passed upon by the City Attorney and that is, that no organization, regardless of its affiliations, union or nonunion, can tell a political subdivision possessing the attributes of sovereignty, whom it can employ, how much it shall pay them, or any other matter or thing relating to its employees. To even countenance such a proposition would be to surrender a portion of the sovereignty that is possessed by every municipal corporation and such a municipality would cease to exist as an organization controlled by its citizens, for after all, government is no more than the individuals who go to make up the same and no one can tell the people how they should run their government. It is for the people to say, through their duly constituted and elected officials, how the government should be run under such authority and powers as the people themselves give to a public corporation such as a city. This has been recognized to such an extent that there are very few authorities upon this subject. As a matter of fact I have most carefully searched the authorities since the receipt of your letter and I find that the question has arisen only one time in the Courts of the United States and I shall hereinafter refer to that case.

Even the National Labor Relations Act, which was probably to a certain extent sponsored by labor unions, did not dare to invade the sacred territory of municipal corporations. In the very first part of the Act it is provided under Definitions, that the word employer "shall not include the United States, or any State or political subdivision thereof." I am informed that the War Labor Board has refused to take jurisdiction of a controversy between a city and its employees.



It is difficult to conceive of any organization having the temerity to undertake to dictate to the government, and therefore its people, and its policies with reference to its employees. When any organization undertakes to exert pressure against the government it becomes dangerous and should immediately be dealt with in the severest manner, for if we are to allow pressure groups to dominate the government it will cease to be a government of laws and will become a government of men, which would be controlled by that pressure group which is able to corral the largest number of members regardless of the fact that such members do not constitute a majority of the citizens of the particular political subdivision involved. It is only through the ballot that the destinies of many political subdivisions can be controlled and we have found throughout the years that this is the only safe barrier against tyranny and dictators. If we allow Democracy to perish through efforts of any group that is organized for the purpose of dictating the terms and conditions of their work to the sovereign municipality, we have not only failed in our trust as public servants, but we have also, which is more important, become traitors to our boys in the service.

I understand that the City of Miami has adequate Civil Service Laws. These laws were designed for and have as their purpose, the protection of city employees and they do protect said employees in a proper and legal manner. They have been repeatedly sustained in the courts and are now thoroughly established as a part of our system of government and it is through these laws that the employees must seek redress, if they have any. You find almost universally, particularly in the large cities, Civil Service Laws which carry with them valuable pension rights.

I know that the majority of the city employees of the City of Miami are law-abiding, faithful, loyal servants as well as citizens. I do not believe that they are parties to any such movement as you have outlined. If so, they have been sadly misinformed as to their rights and I am sure that no one would be quicker to remedy the grievous wrong which they have committed.

The case to which I referred as being the only case in the United States touching this proposition, is that of *Railway Mail Ass'n. v. Murphy*, Acting Industrial Commission, decided on November 4, 1943, by the Supreme Court of the State of New York, 44 N. Y. Supp. 2nd, Adv. Sheet No. 8. Mr. Justice Murray, in delivering the opinion of the Court, so clearly stated the law, and his conclusions are so logical and so fundamental, that I shall quote rather liberally from them. The question before the Court was whether or not postal clerks who were Civil Service employees and had affiliated with the American Federation of Labor and therefore became a labor organization or union were acting contrary to public policy. The court said:

"To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizens. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.

"The reasons are obvious which forbid acceptance of any such doctrine. Government is formed for the benefit of all persons, and the duty of all to support it is equally clear. Nothing is more certain than the indispensable necessity of government, and equally true, that unless the people surrender some of their natural rights to the



Government it cannot operate. Much as we all recognize the value and the necessity of collective bargaining in industrial and social life, nonetheless, such bargaining is impossible between the Government and its employees, by reason of the very nature of Government itself. The formidable and familiar weapon in industrial strife and warfare—the strike—is without justification when used against the Government. When so used, it is rebellion against constituted authority."

The Court said further:

"Collective bargaining has no place in government service. The employer is the whole people. It is impossible for administrative officials to bind the Government of the United States or the State of New York by any agreement made between them and representatives of any union. Government officials and employees are governed and guided by laws which must be obeyed and which cannot be abrogated or set aside by any agreement of employees and officials."

The Court in closing said:

"To hold otherwise would be to sanction control of governmental functions not by laws but by men. Such policy if followed to its logical conclusion would inevitably lead to chaos, dictators and the annihilation of representative government."

As you will note from what I have said, I not only concur with Mr. Justice Murray's opinion, but feel that this is the only course that could be taken by any public official who has taken the oath that I took when I became Attorney General of the State of Florida. I am therefore of the opinion that the City Attorney is not only correct in his interpretation of the law, but that for the further reason I have stated herein, you have absolutely no right or authority to grant collective bargaining with trade unions or their agents for your city employees and any organization that they attempt to enter into having such purpose in mind is wholly beyond the pale of the law and you should not in any wise encourage the same, but should absolutely refuse to have anything to do with such an organization or its agents.

September 8, 1943.—043-235.

#### EMIGRANT LABOR AGENT—PROSECUTION

*To Honorable Jack H. Borden, Special Agent, Federal Bureau of Investigation:*

Replying to your request for a statement from me with reference to the pending prosecution of an emigrant labor agent in Orange County, Florida, in the Criminal Court of Record of that county, I submit same briefly in this form, due to the official capacity in which I am acting in the matter in question, to preserve the record of such incident in this office and to provide for your Department, in written form, dictated by me, the official response made to your request. This is done without any desire or purpose of restricting your own official report of the investigation from your standpoint.

My first knowledge of the intended embarkation from Orlando, Florida, of a trainload of negro workmen being sent to a soup company at Camden, New Jersey, came from a group of citrus and farming interests in Orlando by long distance telephone and telegrams. They advised me that approximately 500 negro laborers were scheduled to be sent out of Orlando on an Atlantic Coast Line train at 2 P. M. on July 31st, 1943, and that the recruiting of these men for this migration had been done by an imigrant labor agent according to their information and belief, and inquired as to what, if anything, could be done to stop this exodus of laborers who were then badly needed in the area from which they

were being sent. Following these requests, I made investigations through various channels, including War Manpower Commission representatives in Florida and United States Employment Service agents in Florida at Orlando, to ascertain just what had been done. Being satisfied in the early stages of my investigation that such recruiting had taken place and had been done, particularly at least, by said agent, I wired this person on July 30th, and he replied to same. I reported the matter to Governor Holland and he requested that I go to Orlando to investigate the matter and report to him, all of which I did. In Orlando I conferred with my original informants and complainers, the Tax Collector of Orange County, the County Solicitor of the Criminal Court of Record and the Sheriff. Following this conference, at my request, the Sheriff filed affidavit charging the agent with recruiting emigrant laborers in violation of Chapter 22068, Laws of Florida, Acts of 1943. Said agent was shortly thereafter arrested, gave bond for \$2,000.00 fixed by the Justice of the Peace in Orange county, and was thereafter given a preliminary hearing under the affidavit made by the Sheriff and bound over to the Criminal Court of Record for further prosecution. The County Solicitor almost immediately after the preliminary hearing filed information against said agent under the charge, and he was placed under a new bond in the same amount. His case is to be taken up at the next term of the Criminal Court of Record of Orange county, which convenes on September 15th next.

I prefer not to go any further into details concerning this matter as the above mentioned emigrant labor agent is yet to be tried and all the evidence to be used against him will, of course, be introduced before the Court at his trial, and, as you know, constitutes public records. One of your agents should be present at this trial and I will be glad to see that you are furnished a copy of the transcript of the proceedings. I think it would be likewise improper for me to reveal information obtained through War Manpower Commission channels concerning this matter, but I am glad to refer you to the following officials and representatives thereof for your further inquiry:

General William C. Rose, Chief, Administrative Services, Office of the Executive Director, War Manpower Commission, Washington, D. C.

Mr. R. W. Robnett, Farm Placement Supervisor, War Manpower Commission, Tallahassee, Florida.

Dr. B. F. Ashe, Regional Director, War Manpower Commission, Atlanta, Georgia.

Mr. George Simmons, Manager, U. S. Employment Service, Orlando, Florida.

Mr. L. S. Rickards, Director, U. S. Employment Service for Florida, Tallahassee, Florida.

In addition to procuring the arrest of the agent as aforesaid, I also, in connection with this same exodus of Florida laborers, took the initiative in having two persons arrested in Marion County (at approximately the same time when he was arrested), who were seemingly engaged in the same recruiting effort. One of these men has had a preliminary hearing under the charge and has been bound over to the Circuit Court of that county for prosecution. I am not informed as to whether his trial date has yet been set but the State Attorney of the Marion County circuit, is the prosecuting officer in this case. The other man has never been apprehended. There was also a second warrant issued in Orlando for the arrest of a third person, who, we were informed, was working with said emigrant labor agent and made arrangements for the train on which the negroes were sent out of the State. This third person was a special representative of the soup company. His warrant likewise has not been served as we understand he left the State about the time the train left on July 31st last.

To my knowledge these four persons are the only ones who have been arrested or charged with any violation of State Law in this matter.

I personally attended the preliminary hearing of said agent and participated in its conduct and will personally attend his trial. His prosecution is directly in charge of the County Solicitor of Orange County.

In addition to the foregoing I will be glad to give you for your examination in my office my complete file on this case and from it you may obtain such suggestions as it affords with reference to conducting your further inquiry into this matter.

You might also be interested in the objections, filed by me, to the above mentioned labor agent's being granted a business agent's license for his union. He had a hearing before the State Board created by Chapter 21968, Laws of Florida, Acts of 1943, to pass on these applications for business licenses, on Friday, the 3rd of September. The record of this hearing has not yet been completed but as soon as it has, I will be glad to have you come into the office and read it. This Board has not as yet made its ruling in the matter.

All my actions are official as Attorney General in connection with the foregoing matters, except the objections filed by me to said labor agent's being issued the business agent's license. These objections were interposed unofficially in my capacity as a citizen. I appeared before the Board and presented testimony and support otherwise in connection with these objections on the occasion of the hearing aforesaid.

### CHILD LABOR

July 20, 1943.—043-170.

#### FLORIDA STATE HOSPITAL—EMPLOYMENT OF MARRIED MINOR

**QUESTION:** May a married woman only sixteen years of age be employed by the Florida State Hospital in view of the prohibition contained in the Child Labor Laws?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

Section 743.03, Florida Statutes, 1941, provides that a married female minor, whether a widow or not, may do and perform all acts, matters and things that she could do if she were twenty-one years of age. In view of this provision, several of the prohibitions contained in the Child Labor Laws do not apply to married female minors. However, Section 7 (2) of Chapter 21996, Acts of 1943, provides that no minor under eighteen years of age, whether such person's disabilities of nonage have been removed by marriage or otherwise, shall be employed, permitted, or suffered to work in any place of employment, or at any occupation, hazardous or injurious to the life, health, safety or welfare of such minor, as such places of employment or occupation may be determined and declared by the Florida Industrial Commission to be hazardous and injurious to the life, health, safety or welfare of such minor, after public hearing thereon, and after such notice as the Florida Industrial Commission may by regulation prescribe.

I am not advised as to whether or not the Florida Industrial Commission has made any declarations under the above section of the statutes. You should, I believe, notify the Florida Industrial Commission of the name, age, and marital status of your prospective employee, together with a description of the nature of the place and type of work she will be expected to perform, and request their determination as to whether or not such employment constitutes hazardous or injurious work under any declaration or rules promulgated by the commission.

September 16, 1944.—044-274.

#### MILK DELIVERY—WORKING ON A TRUCK

**QUESTION:** Does the employment of minors under sixteen years of age to deliver milk from a milk truck (which milk truck such minors do not operate or drive, but ride thereon from house to house in delivery of said milk), constitute violation of Subsections (1) (a) and (1) (g) of amended Section 450.08, Florida Statutes, 1941, (Section 7, Chapter 21996, Acts of 1943)?

*To Honorable David Lang, Workmen's Compensation Division,  
Florida Industrial Commission:*

Said Subsections (1) (a) and (1) (g) are quoted as follows:

"(1) No minor under sixteen years of age, whether such person's disabilities of nonage have been removed by marriage or otherwise, shall be employed, permitted or suffered to work in the following occupations: (a) In connection with power-driven machinery; . . . (g) In the operation of a motor vehicle."

It is noted that Subsection (1) (g) amended Section 450.08 (3) (c), Florida Statutes, 1941, which provides as follows:

"(3) No minor under eighteen years of age shall be employed, permitted, or suffered to work: . . . (c) In the operation of a motor vehicle, or as a helper thereon."

On July 29, 1941, this office issued an opinion with respect to milk truck drivers' helpers under sixteen years of age in relation to Section 18, Chapter 18413, Acts of 1937. In dealing with that matter the opinion dealt also with amended Section 12, Chapter 20955, Acts of 1941, which contained the above quoted Subsection 450.08 (3) (c). At that time the quoted words "or as a helper thereon" had not been deleted from the law. The holding of that opinion was that employment of such minors in said service did violate the provisions of the Child Labor Laws (see page 601, Biennial Report of the Attorney General, 1941-42).

In view of the present wording of the quoted provisions of the Child Labor Law, in my opinion, the above question is properly answered as follows:

Since said Subsection (1) (a) prohibits the employment of such minors "in connection with power-driven machinery" and said Subsection (1) (g) prohibits their employment "in the operation of a motor vehicle," it seems reasonable to assume that since motor vehicles are particularly named in this Subsection (1), the terms "power-driven machinery" were not intended to be construed in this connection as including a "motor vehicle." Hence, the employment of such minors under the situation contemplated by the above question is not prohibited by or in violation of either Subsection (1) (a) or (1) (g) of amended Section 450.08 (Section 7, Chapter 21996, Acts of 1943).

November 13, 1944.—044-322.

#### SCHOOL ATTENDANCE AND CHILD LABOR

**QUESTION:** 1. Under Section 232.07 and Section 450.04, Florida Statutes, 1941, as amended, may an employment certificate be issued to permit a person between fourteen and sixteen years of age to work during school hours when such person has not completed the eighth grade?

2. Does Section 450.03 as amended mean that a person under fourteen years of age is not to be permitted to work at any time during school hours in any occupation?



3. Does Section 450.03 as amended mean that a person under fourteen years of age is not to be permitted to work at any time in any hazardous occupation?

4. Does Section 450.03 as amended mean that persons between fourteen and sixteen years of age who are eligible for employment certificates permitting them to work during school hours may not be employed in any hazardous occupation?

5. If a person between sixteen and eighteen years of age applies, under Section 232.08, for an age certificate, for employment in an occupation which is definitely hazardous, such as the manufacture of explosives or the operation of power-driven machinery, may the County Superintendent refuse to issue the certificate unless the Florida Industrial Commission has recognized the occupation as hazardous and has given a notice to that effect, as provided by Section 450.08 as amended?

*To Honorable Colin English, State Superintendent of Public Instruction:*

1. Answering your first question, Section 232.07 requires, among other things, before a certificate may be issued, a statement by the school principal or the teacher in charge of the last school attended by the child, that the child has completed the eighth grade or its equivalent, etc. Accordingly, the employment certificate may not be issued to a person between fourteen and sixteen years of age who has not completed the eighth grade or its equivalent. Section 450.04 as amended does not affect your question because that section applies only to special certificates of employment during vacation or out-of-school hours.

2. Answering your second question, neither Section 450.03 as amended, nor any other statute, permits employment of a minor under fourteen years of age during school hours in any occupation. It is true that Section 450.02 as amended reads in part:

"No provision of this law, except those provisions relating to employment certificates, shall apply to any minor employed or engaged in domestic or farm work in connection with his own home and directly for his parents, when the public schools are in session."

The apparent conflict between that provision, on the one hand, and Section 450.03 and the compulsory school attendance statute, on the other, is avoided by construing the words "when the public schools are in session" in Section 450.02 as amended, to mean nonschool hours during a school term; in other words, the minor under fourteen must, in any case, attend school during school hours and may not engage in any work, even domestic or farm work in connection with his own home and directly for his parents, during school hours in a school term, but he may perform such domestic and farm work during a school term in nonschool hours. I think that was the intention of the Legislature in amending Section 450.02.

3. It is my opinion that Section 450.03 prohibits the employment of a minor under fourteen years of age at any time in any hazardous occupation. This is in answer to your third question.

4. Answering your fourth question, it is my opinion that only those hazardous occupations mentioned in Section 450.03 and Section 450.08 are prohibited to minors between the ages of fourteen and sixteen. In other words, the prohibition seems to be limited to the named hazardous occupations.

5. Answering your fifth question, our statutes require school attendance only to the age of sixteen years. Section 232.08 does not relate to the kind of employment in which the child may be engaged. It merely provides a convenient method of determining the age of the child when he wishes to apply for employment. For this reason, it is my opinion that the County Superintendent may not lawfully refuse to issue the age certificate. The statute imposes no duty on the County Superintendent beyond the issuing of the age certificate, but if a child between sixteen and eighteen

years of age proposes to work in one of the hazardous occupations mentioned in your question or other employment which the Superintendent deems hazardous, I think he should so notify the minor, his parents, the employer, and the Florida Industrial Commission, perhaps requesting the latter to make a determination and declaration as contemplated by Section 450.08 in regard to employment of that nature by minors under eighteen years of age.

August 1, 1944.—044-221.

**WHOLESALE LIQUOR DEALER—EMPLOYMENT OF MINOR  
UNDER SIXTEEN**

**QUESTION:** 1. May a child under sixteen years of age be lawfully employed in the office of a dealer who handles liquor on a wholesale basis?

2. Should the County Superintendent issue an employment certificate to the child?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 450.23, Florida Statutes, 1941, as amended by Chapter 21996, Acts of 1943, is as follows:

"No person under twenty-one years of age, whether such person's disabilities of nonage have been removed by marriage or otherwise, shall be employed, permitted or suffered to work in, about, or in connection with, any pool room, billiard room, brewery, saloon, barroom, or any place where intoxicating liquors are manufactured or sold; provided, however, this section shall not apply to professional entertainers between the ages of eighteen and twenty-one years who are not in school or to drug stores or grocery stores which have obtained a license to sell beer and wine, and where such sales are made for consumption off the premises only; and provided further, this section shall not prohibit the employment of bellboys, elevator boys and others under the age of twenty-one years in hotels where such employees are engaged in work apart from the portion of the hotel property where alcoholic beverages are offered for sale for consumption on the premises."

The amendment of 1943 relaxed, to some extent, the strictness of the statute, but after a careful study, I am of the opinion that such employment would not be lawful and accordingly the County Superintendent should not issue the certificate.

## CHAPTER XXIV

### PROFESSIONS AND VOCATIONS

#### BASIC SCIENCE LAW

April 24, 1944.—044-139.

#### ALIENS—EXAMINATION

**QUESTION:** May the State Board of Examiners in the Basic Sciences admit to examination a citizen of a foreign country with the understanding that no grades will be given him until he becomes a naturalized citizen of the United States, which he expects to become shortly after being admitted to examination by the Board?

*To Honorable John F. Conn, Secretary, State Board of Examiners  
in the Basic Sciences, DeLand, Florida:*

This question is answered by Section 456.10, Florida Statutes, 1941, which reads in part:

"No person shall be eligible for examination for a certificate of proficiency in the basic sciences until he shall have furnished satisfactory evidence to the board that he is a citizen of the United States of America . . ."

In view of the restrictive provisions of the law quoted above the applicant would not be eligible for examination by your Board until the moment he became a naturalized citizen of the United States and it follows that the plan suggested for withholding his grades until he became a naturalized citizen is likewise not authorized by law since there is no authority to admit him to examination at all until he attains the status of a citizen of the United States.

February 26, 1943.—043-63.

#### EXAMINATION—CITIZENSHIP REQUIREMENTS

**QUESTION:** May a Canadian who has taken out his first naturalization papers be permitted to stand the basic science examination, such person desiring to become licensed by the State Medical Board, which Board admits to its examinations those candidates who have taken out first papers?

*To Honorable John F. Conn, Secretary, State Board of Examiners  
in the Basic Sciences, DeLand, Florida:*

The State Medical Board is permitted to admit to its examination persons who are not citizens of the United States, because its statute provides that an applicant for license from that Board must be either a citizen of the United States or must have declared his intention of becoming such citizen; whereas the Basic Science Statute permits only those who are citizens of the United States to be examined in the basic sciences by your Board.

I realize, of course, that there is during this emergency an urgent need for doctors. However, the Basic Science Statute is very clear and definite, and admits of no construction which would permit the examination of one who is not a citizen of the United States.

## OSTEOPATHS

March 24, 1944.—044-94.

### LICENSING—RELOCATED PHYSICIANS

**QUESTION:** May temporary licenses for the duration of the war emergency legally be issued to osteopathic physicians who are graduates of recognized Schools of Osteopathy and are registered in states other than Florida, to practice such profession in this state under procedure similar to that by which physicians practicing medicine have been permitted to practice in this state for the duration?

*To Dr. Charles C. Tindall, Chairman, State Board of Osteopathic Medical Examiners, Kissimmee, Florida:*

The procedure for the temporary licensing of relocated physicians practicing medicine is briefly as follows: The Governor issued an Executive Order to the State Defense Council authorizing the Council to issue temporary licenses for the duration to physicians in counties where the County Medical Association has certified the name of the physician, his qualifications and the need for such physician in the county. Such procedure was approved by the State Board of Health, the State Board of Medical Examiners and the Board of Governors of the Florida Medical Association. Each physician certified must be approved by the office of medical procurement and assignment.

I see no reason why a similar procedure could not be set up to license osteopathic physicians during the war emergency. It will, of course, be necessary for you to request the Governor and the State Defense Council to set up machinery similar to that used for licensing medical physicians. The authority to set up such procedure is conferred upon the Governor and the State Defense Council by the State Defense Council statute. The purpose and intent of the statute, among other things, is to give the Governor and the Council such emergency powers during the war as may be necessary for the protection of the health of civilians.

## CHIROPRACTORS

August 14, 1943.—043-207.

### RECIPROCAL LICENSES—BASIC SCIENCE REQUIREMENTS

**QUESTION:** May the Florida State Board of Chiropractic Examiners issue reciprocal licenses to nonresidents who meet the requirements of its law and who come from states having basic science requirements similar to those of the State of Florida?

*To Dr. Daniel E. Kirk, President, Florida State Board of Chiropractic Examiners, Jacksonville, Florida:*

Section 456.03, Florida Statutes, 1941, provides in substance that no person shall be granted any license to practice the healing art or any branch thereof until he has presented to the licensing board a certificate of proficiency issued by the Florida Basic Science Board.

The Basic Science Law of this state contains no provision authorizing either the Basic Science Board or any other licensing board to waive the foregoing requirements or grant reciprocal certificates of proficiency in the basic sciences. Only the Florida Basic Science Board is authorized to pass upon the basic science qualifications of applicants for licenses to practice the healing art in this state.

It is, therefore, my opinion that your Board is not authorized to issue reciprocal licenses, unless the applicant for such license presents to your Board a certificate of proficiency issued by the Florida State Basic Science Board.



### CHIROPODY

November 7, 1944.—044-317.

#### AUTHORITY OF CHIROPODISTS TO PRESCRIBE NARCOTIC DRUGS

**QUESTION:** Are Chiropractors authorized by the Laws of the State of Florida to administer and prescribe narcotic drugs, and if so, to what extent?

*To Honorable M. H. Doss, Director, State Bureau of Narcotics,  
Jacksonville, Florida:*

Your question turns upon an interpretation of Sections 398.02 (1), 398.08 and 461.01, Florida Statutes, 1941. The first two sections refer to physicians who are authorized to administer narcotic drugs under the State Uniform Narcotic Drug Law. The third section defines the practice of chiroprody.

It is my opinion that these statutes when given their plain meaning and when they are construed together, authorize a chiroprapist to administer or prescribe narcotic drugs to the extent necessary for medical, surgical and palliative treatment of ailments of the human foot or leg, except the amputation thereof, but not otherwise. You will note that Section 461.01 expressly provides that the practice of chiroprody shall include (not exclude) the use and prescription of local anesthetics.

So long as a chiroprapist honestly and legitimately prescribes narcotic drugs within the limits of the special branch of the medical profession in which he is licensed to practice, he is acting within the authority granted him by law.

### NATUROPATHY

March 20, 1944.—044-79.

#### ENFORCEMENT OF EDUCATIONAL REQUIREMENTS

**QUESTION:** Are the educational requirements, contained in Section 4, Chapter 21707, Laws of Florida, 1943 (Section 462.18, 1943 Supplement, Florida Statutes, 1941), constitutional?

*To Dr. Thomas W. Evans, Secretary-Treasurer, Florida State  
Board of Naturopathic Examiners, Miami, Florida:*

This raises the question of the constitutionality of Section 4 and I must advise you that as it has not been declared unconstitutional by the courts, ministerial officers must obey the section until in a proper proceeding its constitutionality is judicially passed upon, or it is repealed. Every law found upon the statute books is presumptively consonant with the Constitution until declared otherwise by the courts.

You are informed, however, that if the Board is desirous of having the constitutionality of the questioned section resolved this may be properly determined by a test case, or by a declaratory decree as provided by Chapter 21820, Acts of 1943.

September 18, 1943.—043-257.

### PRACTICE OF MIDWIFERY

**QUESTION:** May naturopaths render midwifery services and practice obstetrics under Florida Law?

*To Honorable Joseph Miyares, Hillsborough County War Price and  
Rationing Board, Tampa, Florida:*

Section 462.05, Florida Statutes, 1941, specifically refers to midwifery in enumerating the courses of study in approved Colleges of Naturopathy.

Section 462.11, Florida Statutes, 1941, provides that doctors of naturopathy shall observe and be subject to all state, county and municipal regulations in regard to the control of contagious and infectious disease, the reporting of births and deaths, etc.

In my opinion, the foregoing statutes recognize the right of naturopaths to practice midwifery, and require them to report all births in which they have assisted.

Section 457.91, Florida Statutes, 1941, provides that no person other than a duly registered and licensed physician shall practice midwifery unless such person shall be duly registered as a midwife with the State Board of Health.

It is my opinion that the word "physician" as used in the foregoing statute, is broad enough to, and does, include duly registered and licensed "naturopaths."

Therefore, it is my opinion that a duly registered and licensed naturopath under Florida law may practice midwifery.

From your request, it does not appear to be necessary to pass upon the right of naturopaths to practice obstetrics, since they are authorized to render midwifery services. Therefore, this opinion does not purport to show any distinction or similarity between midwifery and obstetrics.

### OPTOMETRY

July 7, 1944.—044-184.

#### PRESCRIPTION OF LENSES BY NATUROPATHIC PHYSICIANS

**QUESTION:** May naturopathic physicians, who are not duly licensed optometrists, lawfully prescribe lenses for human eyes?

*To Dr. Thomas W. Evans, Secretary-Treasurer, State Board of Naturopathic Examiners, Miami, Florida:*

In view of the provisions of Chapter 463, Florida Statutes, 1941, regulating the practice of optometry in this State, it is my opinion that unless a naturopathic physician has been duly examined by the State Board of Optometry and has received a certificate from said Board to practice optometry in this state, it would be unlawful for him to undertake to prescribe lenses for human eyes.

Section 463.08 of said chapter makes an exception as to duly licensed medical physicians and surgeons and they are not precluded by said chapter from practicing any phase of optometry in this state.

April 22, 1943.—043-102.

#### REVOCATION OF LICENSE—PERSON CONVICTED OF FELONY

**QUESTION:** A person duly licensed by the Florida State Board of Optometry to practice optometry was convicted of a felony for which he has served a two year sentence in the State Prison. Now, about one year after the completion of his sentence, the Board has not revoked his license, and such person is demanding a renewal of such license under appropriate portions of the law governing the Board.

In connection with the foregoing facts, may the Board at this time revoke the license of such person, based upon the felony conviction above referred to?

*To the Florida State Board of Optometry, Tampa, Florida:*

The procedure for the revocation of a certificate of registration granted by your Board is a special proceeding prescribed by the provisions of law relating to the practice of optometry. The time within which such pro-

ceedings shall be commenced is not limited. The object of the law is to prevent immoral or dishonorable persons from procuring licenses to practice optometry in this state, and if persons having licenses are found to be dishonorable, then their licenses might be revoked. The Statute of Limitation does not, in my opinion, apply to such revocation proceedings. See Section 58, Volume 41, Am. Jr. on Physicians and Surgeons, also State Medical Examining Board v. Stewart, 46 Wash. 79, 89 Pac. 475.

Our Supreme Court has held that a pardon granted to a physician convicted for perjury was no defense to a proceeding subsequently instituted before the Board of Medical Examiners to revoke the physician's license. See *Page v. Watson*, 192 So. 205. In that case the physician was convicted in 1929, and the revocation proceedings in question appear to have been held in 1933. The Court stated in its opinion that the pardon restored petitioner's rights of citizenship but that it did not restore or affect his qualifications or his character, or exempt him from the enforcement of the statute authorizing his license to practice medicine to be revoked. In your present problem, you are not faced with a pardon which might restore a person's rights of citizenship, but the person in question, I understand, has served out his sentence, which fact would not entitle him to any more consideration than a pardon would.

It is therefore my opinion that your Board may proceed to institute revocation proceedings under the facts set out in your request.

January 20, 1944.—044-22.

#### SALE OF LENSES—PRESCRIPTION

**QUESTION:** Does Chapter 21769, Laws of Florida, Acts of 1943, prohibit an optician, such as an optical company, from filling prescriptions written by a nonresident optometrist or eye specialist?

*To Honorable L. C. Leedy, Representative, Orange County, Orlando, Florida:*

Section 1 of said chapter defines an optician to be a person, firm or corporation engaged in manufacturing, processing and dispensing lenses and frames for spectacles, without, however, engaging in the diagnosis, or determination of the refractory powers of human eyes, or prescribing lenses or treatment for human eyes. Said Section declares that such trade or occupation in this state is lawful. Section 2 provides that opticians shall pay a state license tax of \$10.00 and a county license tax of \$5.00. Section 3 provides that opticians shall not be subject to the jurisdiction of any board, agency or commission regulating any other trade or profession; provided, however, that if an optician shall also engage in any other trade or profession besides that of an optician he shall comply with all laws applicable to such other trade or profession.

It is my opinion therefore that there is no prohibition in Chapter 21769 preventing opticians from simply dispensing or selling lenses and frames to anyone on a prescription from an optometrist or eye specialist residing within the State, provided that in making such sales opticians do not in any manner undertake to diagnose or examine the eyes of any person in connection with a sale, or undertake to prescribe any lenses for any person in order to make a sale. In other words, where a person orders a lens from an optician in this state by means of a prescription from a nonresident optometrist or eye specialist, there appears to be no prohibition in Chapter 21769 preventing the optician from merely filling the prescription exactly as it reads. It is only when the optician undertakes to diagnose or examine eyes or prescribe lenses therefor that he violates Section 1 of said Chapter.

You will note also that opticians defined in Chapter 21769 are not placed under the jurisdiction of any State Board.

December 19, 1944.—044-347.

STATE BOARD OF OPTOMETRY—TRAVELING EXPENSES  
OF MEMBERS

QUESTION: What amounts are allowable to the members of the State Board of Optometry by law as compensation and for necessary actual expenses?

*To Dr. W. F. Humphries, Chairman, Law Enforcement Committee,  
State Board of Optometry, Tampa, Florida:*

It is my opinion that under Section 463.18, Florida Statutes, 1941, each member is entitled to compensation of ten dollars per day for each day he is actually engaged in the duties of his office, and with the exception of traveling expenses, he is entitled to actual reimbursement for other incidental expenses such as clerical help, stationery, etc., which he may legitimately incur in the performance of his official duties.

No obligations for such expenses should be incurred without previous express authority of the Board duly reflected in its minutes.

Expenses for traveling should be allowed as authorized by Section 112.06, Florida Statutes, 1941, as amended by Chapter 21913, Laws of Florida, Acts of 1943; that is to say, \$6.00 per diem for subsistence within the State or \$10.00 without the State and 5c per mile when the member is traveling in his privately owned car. If he is traveling by common carrier he should procure the usual transportation request. Chapter 21913 is a subsequent enactment to Section 463.19, as amended by Chapter 21792, Acts of 1943. It is a complete revision of the subject and applies to all State Officers, including your Board, insofar as subsistence, mileage and transportation allowances are concerned, but not otherwise.

The fact that Section 463.18, was re-enacted with slight changes in Chapter 21792 by the 1943 Legislature, which Chapter took effect subsequent to Chapter 21913, is immaterial. Chapter 21792 became a law May 22, 1943. It is not the time when a law becomes effective that governs insofar as repeals are concerned but the time when it becomes a law. Furthermore, the re-enactment of Section 463.18 without change of its provisions and without additional ones relating to allowance of expenses of members of the Board does not make the same a new enactment as to such expenses, but merely indicates a continuance of the existing provisions.

Chapter 21913, Laws of Florida, Acts of 1943, became a law June 2, 1943. Expenses of your board members should be paid from and after June 2, 1943 as outlined above. Prior to that date they should be paid according to the departmental construction of Section 463.18, previously obtaining.

NURSING

January 14, 1943.—043-15.

APPLICANTS—AGE REQUIREMENTS

QUESTION: The State Board of Examiners of Nurses will hold its examination of applicants for registration as nurses on March 22 and 23. One of the applicants will be twenty-one years of age on March 28, and if not permitted to take the examination at this time such person will have to wait several months for the next examination.

In connection with the foregoing facts, may applicants for registration as nurses be permitted to stand the examination prior to attaining the age of twenty-one years?



*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

Section 464.04, Florida Statutes, 1941, provides that each applicant for registration shall furnish satisfactory evidence that she is twenty-one years of age, of good moral character and has graduated from a school for nurses connected with a hospital approved by the State Board of Examiners of Nurses.

Section 464.09, Florida Statutes, 1941, provides that before any person shall be given a certificate of registration as a nurse, such person shall be required to take an examination from the State Board to determine her qualifications as a trained nurse.

The statutes contain no requirements that applicants for examination by your Board shall have attained the age of twenty-one years. The statutory requirement is that applicants for registration as trained nurses must have attained the age of twenty-one years, and one who has applied for such registration continues to be an applicant until your Board has finally acted upon such application, or until such application has been withdrawn.

The qualifications for registration, in my opinion, have nothing to do with the qualifications for taking the examination. So long as the applicant meets the qualifications for registration prior to the time the certificate of registration is issued, and has previously thereto satisfactorily passed an examination to determine her qualifications as a trained nurse, such applicant may be registered. A person might make application to take your examination several months prior to the date of examination, and at the time of making the application be a person of good moral character, but might, even after passing the examination, but before being granted a certificate, become such a moral derelict as to justify the Board in refusing to register her. Therefore, it seems to me to be clear that the statutory qualifications of applicants for registration should be applied at the time the registration certificates are issued, and in my opinion you may permit those who have not yet attained the age of twenty-one to take the examination and register them as trained nurses in due course thereafter, if at that time they meet the statutory requirements as to qualifications.

August 28, 1943.—043-222.

#### BOARD OF EXAMINERS—COMPENSATION

QUESTION: 1. Where members of the Board of Examiners have been charging at the rate of \$5.00 a day for compiling questions and answers for each examination given by the Board, should such charge be made as an expense or as salary?

2. Are board members entitled to compensation for days en route to and from board meetings in addition to the usual travel allowance?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

Section 464.04, Florida Statutes, 1941, provides as follows:

"The salary of the secretary of the state board of examiners for nurses shall be fixed by the board and shall be not less than one hundred nor more than twelve hundred dollars per annum, payable monthly upon requisition to the comptroller out of the funds known as the state board of nurses' funds. The other members of the board shall receive five dollars per day for each day actually engaged in attendance upon the meetings of said board, and all necessary expenses incurred while looking after the business of the board. All of the expenses of the board including salaries shall be paid from

moneys received as fees under the provisions of this chapter upon vouchers itemized and certified to the comptroller."

From the above quoted statute it appears that the per diem allowance is in addition to all necessary expenses and, therefore, in my opinion, would constitute compensation for personal services and should be reported as salary.

You have not requested it and I am not passing upon, in this opinion, whether or not an allowance of \$5.00 per day can be made for compiling questions and answers for each examination where this work is not done while in attendance at meetings of the Board.

With reference to your second question, it is my opinion that board members are entitled to the \$5.00 per diem allowance for days en route to and return from board meetings. In many instances it might be necessary for a board member to devote a major portion of two days in traveling to and from a meeting of the Board. I do not believe it was the intention of the Legislature that board members should give their time in this manner without compensation and merely be reimbursed for their actual traveling expense.

May 31, 1943.—043-124.

#### BOARD OF EXAMINERS—EXAMINATIONS

**QUESTION:** Must all members of the Board of Examiners of Nurses be present while examinations are given, and is it necessary to have a board meeting before examinations?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

The statute requires that the State Board of Examiners for Nurses shall meet for the purpose of holding examinations not less than once in each year, at such time and place as it may determine, and at such meetings the Board shall examine all applicants who meet the requirements of the law.

The statute also provides that three members of the Board shall constitute a quorum.

It is my opinion, in view of the foregoing provision of the statute, that examinations must be held by at least a quorum of the Board. Anything less than that would not constitute the Board, and the statute specifically provides that the Board shall hold the examinations. The statute, in my opinion, contemplates a meeting of the Board at the time of the holding of examinations.

September 12, 1944.—044-269.

#### BOARD OF EXAMINERS—PRESENCE OF NONMEMBERS AT MEETINGS

**QUESTION:** 1. Are business meetings of the Florida State Board of Examiners of Nurses open to anyone who is not a member of the Board?

2. May one who is not a member of the Board assist in giving examinations, or even attend?

3. May one who is not a member of the Board represent the Board in any state affairs, with expenses and salary to be paid by the Board?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

With reference to the first question posed above, you are advised that nowhere in our statutes does there appear authority for excluding the public from ordinary business meetings of the Board. A public body, con-

sisting of several persons, which is authorized to perform acts of a public nature, and to which public duties are intrusted, should perform such duties in a public manner and without obstruction to anyone's attendance. There is no intention, however, that the Board be annoyed and hampered in performing its public duties. I presume that it would be difficult for the general public to become aware of the date, time and place set for its ordinary business meetings, since the law does not make it mandatory for public notice to be given.

Passing to your second question, it is the legal duty of the Board itself, a quorum being present, to hold examinations, and the power to delegate this obligation does not appear in the Nursing Law, although mere clerical assistance would appear permissible. I do not see how any harm could arise from the attendance, at an examination, of one not a member of the Board, although the attendance of persons not taking examinations or who are not board members would seem unadvisable, and should be limited.

In answer to your third query, it is not clear just what is meant by "state affairs," but the power to appoint someone to perform the duties imposed by law upon the President, Secretary, Treasurer or Training School Inspector is not found in the law. Until it is made plain to me what the said term embraces, I am unable further to answer this question.

May 31, 1943.—043-132.

#### BOARD OF EXAMINERS—REQUIREMENTS FOR GRADUATION

**QUESTION:** During the emergency, State Boards are giving examinations to nurses who have completed their theory and lack not more than ninety days of completing the prescribed course of practice training, and many of the hospitals and training schools are having graduation early this year.

1. In connection with the foregoing, may a student, after appearing for public graduation, resign from the School of Nursing and demand her signed diploma?

2. May a student nurse who has written and passed the examination given by the Florida State Board demand a license from the Board, even though she has not finished her three years' training?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

1. It is my opinion that training schools may, if they desire, hold their graduations prior to completion of the prescribed period of training and condition the granting of diplomas upon the completion of the prescribed period of training.

2. It is my opinion that under the facts outlined above, your Board may hold examinations for student nurses who have completed their theory but who lack a few weeks of completing their practice training, and withhold licenses to such persons who successfully passed the examination until they have completed the prescribed period of training approved by your Board.

May 29, 1943.—043-122.

#### BOARD OF EXAMINERS—SALARIES; EXPENSES

**QUESTION:** Who should sign vouchers and requisitions for payment of the expenses of the Board of Examiners?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

The members of your Board are public officers and under the law may sign their own salary and expense vouchers and requisitions. The Board may, by appropriate action, authorize the Secretary, Treasurer, or some other member to sign vouchers and requisitions for the general expenses of the Board. Since your Board does not meet frequently, and therefore would not be in a position to approve every expenditure before requisitioning payment therefor, the Board may, by appropriate resolution spread upon its minutes, authorize some officer or member of the Board to requisition payment of fixed expenses such as salaries of employees and regular office expenses. Unusual expenditures, however, should be approved by the Board, and may be submitted to the various members of the Board by the Secretary for their individual approval while the Board is not in session.

May 31, 1943.—043-123.

#### CITIZENSHIP REQUIREMENT FOR REGISTRATION

**QUESTION:** May the Florida State Board of Examiners of Nurses register a qualified nurse from England who is at present in the State of Florida and has applied for registration? May the Board issue a temporary license to such person?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

A temporary permit to practice nursing may be issued by the Secretary of your Board, which permit, however, is valid only from the date issued until the next meeting of the Board.

The law contains no provision with reference to citizenship. If the party in question has graduated from a school for nurses connected with a hospital approved by a board corresponding to your Board, and meets the other requirements for examination, then you may examine such person and issue a license if such person successfully passes the examination.

Furthermore, it is my opinion that you may register such a person without an examination if the Board is satisfied that said person is a registered nurse under the law of another jurisdiction having requirements equivalent to those of Florida.

July 5, 1944.—044-192.

#### NURSES—PAYMENT OF BACK FEES AFTER DISCHARGE

**QUESTION:** Will nurses in the armed services be required to pay back fees when they are reinstated after their discharge?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

The 1943 Legislature, by Chapter 21885, provided that any member of the armed forces who, at the time of his becoming such a member, was in good standing with any Florida administrative board and was entitled to practice or engage in his profession or vocation in this state should be kept in good standing by such board without registering or paying dues or fees as long as he was in the armed forces on active duty and for a period of six months after his discharge therefrom.

An implication of the term "good standing" is the payment of fees, dues or assessments, and the Act above requires an administrative board



to keep its registrants, now serving our country, in good standing, specifically mentioning without payment of dues or fees.

Therefore, it is my opinion that the intent of the Legislature was that your Board must not require the payment of any back dues or fees from nurses upon their discharge from active duty nor may it exact any dues or fees for a period of six months thereafter.

October 19, 1944.—044-305.

#### REGISTRATION OF ALIEN OR IMMIGRANT NURSES

**QUESTION:** Are nurses, whose importation from Cuba was arranged by a private hospital, subject to the provisions of the act for the registration of nurses?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

It appears that there has been a recent importation of a number of Cuban nurses, who are now employed at a certain hospital in Dade County. My investigation of this matter shows that up until recently there were seventeen Cuban nurses employed, ten of whom were admitted at Miami temporarily for one year to work as staff nurses at the hospital, and one of these ten returned to Cuba on October 5th. The other seven were admitted for permanent residence, they being in possession of immigration visas.

None of these nurses was imported by the War Manpower Commission or by the Immigration and Naturalization Service. A recent utilization survey completed by the War Manpower Commission indicated a shortage of nurses, and no doubt it was concluded that WMC was instrumental in the importation. Existing laws and regulations permit any alien to enter the United States, if he or she can comply with the physical, mental and other requirements set forth in the immigration statutes.

It appears, from information furnished this office, that a serious shortage of nurses existed in Dade County and the War Manpower Commission, at the request of various hospitals in that county, conducted a survey which showed that the hospitals were short 170 nurses. The officials of the particular hospital mentioned arranged with hospitals in Cuba for the seventeen individuals involved.

Ordinarily, corporations, companies, institutions or individuals are forbidden to import any type of skilled or unskilled alien labor, except the few exempt classes listed in Section 3 of the Immigration Act of 1917. Among these exempted classes are professional nurses, but this relates to Immigration Laws and not to State Nursing Law registration requirements.

It is my opinion that the State Nursing Law is applicable to these alien or immigrant nurses, and that they are subject to the registration requirements. However, it would seem advisable that, in view of the acute shortage that is alleged to exist, steps should be taken to give special permits to practice in this area. Initial steps for this purpose should be instituted through the Florida State Defense Council, which has broad powers in time of emergency or public need. Such a plan, you are advised, was recently worked out for the medical profession, which also found itself with a severe shortage of available members.

November 19, 1943.—043-312.

#### TRAINING SCHOOLS—INSPECTION

**QUESTION:** May a member of your Board in the vicinity of each training school be called upon to go with the inspector of schools to aid in the inspection of such school, and, if so, to what salary per diem or other expense would such member be entitled?

*To Miss Florence V. Moore, R.N., Secretary-Treasurer, State Board of Examiners of Nurses, Winter Park, Florida:*

While the statute makes the Secretary-Treasurer of your Board "an inspector of training schools for nurses," it does not make her the exclusive inspector of such schools, and in my opinion the duty of inspecting and registering training schools rests primarily upon the Board, and, if the Board deems necessary and advisable, it may call upon its individual members to participate in the inspection of such training schools.

Such a member, however, would not be entitled to the \$5 per diem allowed by your Act for attendance at meetings of the Board, since such inspection would not be considered as a meeting of the Board. However, such a member would be entitled to all necessary expenses incurred subject to the statutory limitation on travel allowance and subsistence for State employees, with which limitation you are familiar.

### DENTISTRY

November 6, 1943.—043-308.

#### DENTURES SUPPLIED BY LICENSED DENTISTS ONLY

**QUESTION:** Do the Statutes of Florida prohibit the acts enumerated in Paragraphs 1, 2 and 3 of United States Public Law No. 843, approved December 24, 1942?

*To Honorable M. H. Ackerman, Post Office Department,  
Bureau of the Chief Inspector, Atlanta, Georgia:*

The Act of Congress referred to, Section 420 f, Title 18, U. S. C. A., makes it unlawful in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrument of interstate commerce, for the purpose of sending or bringing into any state or territory any denture constructed from any cast or impression made by any person other than or without the authorization or prescription of a person licensed to practice dentistry under the laws of the State or territory into which such denture is sent or brought, if the laws of such state or territory prohibit:

(1) The taking of impressions or casts of the human mouth or teeth by a person not licensed under the laws of such state or territory to practice dentistry;

(2) The construction or supply of dentures by a person other than, or without the authorization or prescription of a person licensed under the laws of such state or territory to practice dentistry; or

(3) The construction or supply of dentures from impressions or casts made by a person not licensed under the laws of such state or territory to practice dentistry.

Section 466.02, Florida Statutes, 1941, provides as follows:

"It shall be unlawful for any person to practice dentistry or dental hygiene in the State of Florida, except:

"(1) Those who are now duly licensed and registered dentists, pursuant to law;

"(2) Those who are now duly licensed and registered dental hygienists, pursuant to law;

"(3) Those who may hereafter be duly licensed and registered as dentists or dental hygienists, pursuant to the provisions of this chapter."

Section 466.04, Florida Statutes, 1941, defines the practice of dentistry as follows:

"Any person shall be deemed to be practicing dentistry . . . who directly or indirectly, by any means or method, takes impression of the human tooth, teeth, jaws, or performs any phase of any operation incident to the replacement of a part of a tooth; or supplies artificial substitutes for the natural teeth, or who furnishes, supplies, constructs, reproduces or repairs any prosthetic denture, bridge, appliance, or any other structure to be worn in the human mouth, except on the written prescription of a duly licensed and registered dentist; or who places such appliance or structure in the human mouth, or adjusts or attempts or professes to adjust the same, or delivers the same to any person other than the dentist upon whose prescription the work was performed; or who professes to the public by any method to furnish, supply, construct, reproduce, or repair any prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth . . ."

It is my opinion that the foregoing Florida Statutes prohibit (1) the taking of such impressions or casts by anyone who is not licensed to practice dentistry; (2) the construction or supply of dentures by any person unless he is licensed to practice dentistry or constructs or supplies such dentures pursuant to the authorization or prescription of a licensed dentist; (3) the construction or supply of dentures from impressions or casts, which impressions or casts have been made by one who is not licensed to practice dentistry.

#### FUNERAL DIRECTORS

July 12, 1943.—043-160.

##### EXAMINATIONS—RULES AND REGULATIONS

**QUESTION:** Has the Governor or the State Board of Funeral Directors and Embalmers, authority, for the duration only, to allow applicants for this Board's examination to take the same without meeting all the requirements contained in the statutes, but with the understanding that a certificate to engage in the business or to practice is not to be issued until these required qualifications are met?

*To Honorable Spessard L. Holland, Governor:*

Section 470.04, Florida Statutes, 1941, empowers the Board to formulate and adopt rules and regulations for the proper administration of our state's Funeral Directors' and Embalmers' Law. Section 470.08 prescribes qualifications of applicants for examination by the Board. Section 470.09 provides that licenses to practice the profession of funeral directing or emblaming shall be granted by the Board to any applicant eligible for examination and who has correctly answered more than 75 percent of the oral and 75 percent of the written questions propounded in the examination.

If the Board will adopt a rule uniform and applicable in all cases, and make it a part of its official rules and regulations for the administration of its laws, providing in it that persons about to enter the armed service of the United States may take the Board's examination, even though they do not show conformity to all the requirements exacted of such applicants under the law, but that they shall not be deemed entitled to receive any license to practice their profession because of passing such examination in accordance with the required standard of law, until they can show proper qualifications as applicants in compliance with the applicants' Qualification Law, and providing further that the form for an application in such cases required by the Board shall be a different form from the one required for regularly qualified applicants and shall state in it that in permitting the particular type of applicant to take the examination, the same is done without waiving any requirements of the law applicable

to a licensee, and that all such special applicants shall conform to requirements before becoming entitled to a license, even though he or she may pass the examination without required statutory qualifications, then under such circumstances and conditions the Board may in my opinion examine such applicants as you have referred to in your request.

I do not have a copy of the Board's rules and regulations, nor do I have a copy of its forms used for applicants desiring to take the examinations. If, in passing this opinion on to the Board, you will have it furnish me with these copies, I will be glad to draw the necessary rules and regulations herein contemplated, and the necessary new form for use by these special applicants.

### PUBLIC ACCOUNTANTS

February 17, 1943.—043-53.

#### INTERNAL REVENUE AGENTS

**QUESTION:** Where an employee of the United States Internal Revenue Service has attained a grade or classification, by that Department, which is the equivalent of grade II mentioned in Section 4, Chapter 12290, Laws of Florida, Acts of 1927, may he be granted a certificate without examination under said section?

*To the State Board of Accountancy, Miami, Florida:*

My answer to this question must be confined to those cases and only those cases where application was made for such certificate prior to July 29, 1942, the effective date of Florida Statutes, 1941. Under Section 4, Chapter 12290, Laws of Florida, Acts of 1927, certificates without examination were permitted to be granted, in the discretion of the State Board of Accountancy, to persons engaged in the Internal Revenue Service of the United States "who have passed Grade Number II as now (June 1, 1927) established in that service" where such persons are otherwise qualified. The use of the word "now" indicates an intent on the part of the Legislature to extend the Act to subsequent methods of grading revenue agents where such subsequent grades are the same or the equivalent of grade II as of June 1, 1927.

Therefore, where an employee of the United States Revenue Service has attained a grade or classification which is equivalent to grade II mentioned in the 1927 Act, he may be granted a certificate under said section provided he made application prior to July 29, 1942.

The question as to whether or not the method of grading and the grade is the equivalent to grade II, as of June 1, 1927, is a question of fact to be determined by the Board.

March 1, 1944.—044-66.

#### PRACTICING WITHOUT CERTIFICATE

**QUESTION:** Does the language, "Prepared by Competent Accountants," appearing in a newspaper advertisement, in violation of law, constitute a holding out to the public that certain persons are public accountants?

*To Mr. Russell S. Bogue, Secretary, State Board of Accountancy, Tampa, Florida:*

Section 473.25, Florida Statutes, 1941, prohibits any person from practicing in this state as a certified public accountant or as a public accountant, or from holding himself out to the public as being qualified to practice public accounting, or any phase or branch thereof, in this state,



unless such person shall be the holder of a certificate as a certified public accountant or as a public accountant then in full force and effect.

A person is deemed to be practicing public accounting by Section 473.02, Paragraph (1),

"Who holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of accounting and as qualified to render professional services as an accountant for compensation."

The use of the language, already quoted, in the advertisement is, in my view, a holding out such as is contemplated in Paragraph (1) and is unlawful if the individuals therein named are not holders of either a certified public accountant or a public accountant's certificate.

January 25, 1943.—043-30.

#### STATE BOARD OF ACCOUNTANCY—GRANDFATHER CLAUSE

**QUESTION:** Where persons engaged in the Internal Revenue Service of the United States, and who were qualified to meet the requirements of Section 4, Chapter 12290, Laws of Florida, Acts of 1927, made application to the State Board of Accountancy, prior to the effective date of the Florida Statutes, 1941, for certificates as certified public accountants, pursuant to said Section 4, of Chapter 12290, may such certificates be now issued to such persons?

*To the State Board of Accountancy, Miami, Florida:*

It appears that one person, on August 20, 1941, and another during April, 1942, made application to the State Board of Accountancy for waiver of examination and the issuance of certificates to them as certified public accountants under the Accountancy Laws of this state. Both of these persons assert that they have been residents of this state since prior to June 1, 1927 and that they have passed grade eleven as established by the said Internal Revenue Service of the United States, all as provided in said Section 4 of Chapter 12290. The question as to residence on June 1, 1927 and whether or not grade eleven has been passed are questions of fact to be determined by the Board.

On May 13, 1941 this office rendered an opinion, which has been affirmed by opinions under dates of June 14, 1941, August 4, 1941 and June 1, 1942, wherein it was held that Internal Revenue Agents of the United States, who were residents of the State of Florida on June 1, 1927, and were otherwise qualified, may be certified as certified public accountants without examination. Under this opinion it was held that the applicants need not have been employees of the Internal Revenue Service when the Accountancy Laws were enacted in 1927; need not have passed grade eleven in the Internal Revenue Service when the said laws were enacted, provided they have subsequently passed said grade; however, said applicants must have been residents of the State on said June 1, 1927.

The above provision in the 1927 Act, permitting the certification of persons engaged in the Internal Revenue Service of the United States, without examination, as certified public accountants under the laws of this state was omitted from the Florida Statutes, 1941, and was therefore repealed except insofar as affected by Section 5, Chapter 20719, Laws of Florida, Acts of 1941; which section provided, in substance, that the adoption of the Florida Statutes, 1941, should not affect any rights that may have accrued prior to the adoption of said statutes. In this connection we are of the opinion that the making of the applications by the said persons as aforesaid fixed in them a right which accrued in them prior to the adoption of the Florida Statutes, 1941, and that the State Board

of Accountancy still has full power to grant certificates to the said persons as requested; provided, however, that said applications are in proper form and all other requirements under the said 1927 Act are met by the parties.

In the light of the above, I am of the opinion that your question should be answered in the affirmative.

August 10, 1944.—044-237.

#### STATE BOARD OF ACCOUNTANCY—RECORDS

QUESTION: 1. What records of the State Board of Accountancy must be kept without any consideration of length of time, and what records can the Board destroy?

2. Is there any available space or provision in Tallahassee where records of the Board for past years, which the Board is required to keep, can be stored?

*To Honorable Russell S. Bogue, Secretary, State Board of Accountancy, Tampa, Florida:*

Section 473.06, Florida Statutes, 1941, requires the Board to keep all applications filed, all documents under oath, a record of the Board's proceedings, a registry of the names and addresses of all persons applying for, and of those receiving, certificates of the Board. In the absence of legislative authority, destruction of any public records would be at the risk of the Board.

The Secretary of State informs me that there is no available space in the Capitol or other State Buildings in Tallahassee where records of your Board might be stored. The matter of storage of old records has become a grave problem to some of the State Departments and Agencies, and sooner or later will require legislative action either by way of providing space for storage, or by authorizing destruction of some of these old and valueless records.

#### BEAUTY CULTURE LAW

October 8, 1943.—043-265.

#### APPLICATION FOR EXAMINATION—TIME FOR FILING

QUESTION: May an out-of-state beautician, who has duly filed application for a beautician's examination, change the application on the date of examination to one for a manicurist and pedicurist in lieu of the beautician's examination?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

Section 477.09, Florida Statutes, 1941, as amended by Chapter 21984, Acts of 1943, contains this language:

"Each applicant for an examination shall:

(1) Make application to the Board at least ten days prior to examination date . . ." (Emphasis supplied).

It is indicated, in my opinion, by the part of the section quoted that an applicant must make application for a specific examination ten days in advance of the date set, and a change to another examination may not be made in that ten-day period.

August 27, 1943.—043-221.

### BEAUTICIAN—PREREQUISITES; QUALIFICATIONS

**QUESTION:** 1. May an applicant, who failed in 1936 to pass the junior operator's examination and who thereafter practiced as a beautician for five years in New York, upon returning to this state, be allowed to take the beautician's examination or must she complete the junior operator's examination?

2. May the junior operator's examination fee previously paid be applied on the beautician's examination fee?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

It seems that the applicant failed to pass the examination for junior operator in 1936. Thereafter she moved to New York State where she practiced as a beautician for five years, licenses not being required in that state. Having returned to Florida, it is asked if she may be allowed to take a beautician's examination or if she must complete the junior operator's examination.

Section 477.12, Florida Statutes, 1941, as amended, is as follows:

**"477.12 Prerequisites and qualifications of nonresident applicants.**

—A person who is a citizen of the United States of America; who is at least seventeen years of age, and of good moral character and temperate habits, and who furnishes to the Board a certificate from a practicing medical doctor, dated not more than twenty days prior to the date of the application, attesting that he is free from any contagious or infectious disease and . . . who can prove by sworn affidavits that he has practiced as a beautician in another state or country for at least five years immediately prior to making application in this state, shall, upon payment of the required fee, be issued a permit to practice as a junior operator only until he is called by the Board for examination to determine his fitness to receive a certificate of registration to practice beauty culture."

It will be noted from the section heading that perceivably this section applies only to nonresidents. A perusal of the body of the section, however, reveals without ambiguity that the application is to a "person who is a citizen of the United States" and does not exclude residents of Florida. These section headings are inserted by revisors for convenience or reference and are not essential parts of the statute. Statutory Construction, Crawford, Section 207; 59 C.J. Sec. 376. Where there is no ambiguity they should not be referred to in ascertaining the intention of the Legislature, and this is true even though enacted by the Legislature as a part of the act. *Ibid.*

The applicant may, by virtue of having practiced as a beautician in another state for five years, if immediately prior to making application in this state, be permitted to take the beautician's examination.

Turning to the second question, if the applicant qualifies under the description of one who has practiced as a beautician in another state for five years, she no longer relies on any standing or privileges she may have acquired with the Board, and possible benefits from it, including a fee formerly paid, cannot be considered. When she places herself in the category or bracket of one having five years experience elsewhere it is as if she had never previously appeared before the Board.

It is my opinion that the junior operator's fee paid in 1936 may not be applied on the fee for a beautician's examination of one who qualifies on the basis of having practiced as a beautician five years in a different state.

September 30, 1944.—044-292.

**BEAUTY SALON—EMPLOYMENT OF NURSE AND BARBER**

**QUESTION:** 1. May a registered nurse act as an attendant in the slenderizing department of a beauty salon?

2. May a registered barber work in a beauty salon and cut hair only?

*To Miss Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture:*

Although it is specifically provided in the Beauty Culture Law that the provisions of the chapter shall not be construed to apply to nurses registered under the laws of this state, there is serious doubt in my mind of the validity of this exemption if it is to be construed that nurses may engage in all phases of beauty culture as defined. I am cognizant of the fact that nurses are regulated and controlled by other statutes applicable to them, but it is my belief that, without first complying with the statute regulating beauty culture, they may only do those things incident to their respective regulated vocations, such things also being incident to the vocation of beauty culture. See *DiLustro v. Penton*, 142 So. 898.

It is my opinion, therefore that a registered nurse may do only those acts of beauty culture for which her training as a registered nurse has prepared her. If acting as an attendant in the slenderizing department is within her training as a nurse, she could lawfully act as such attendant.

It appears that there is an inquiry as to the legality of the action of the City of St. Petersburg in requiring the attendant, discussed above, to take out a permit as an apprentice operator. Although you do not request an opinion on the legality of this action, you are advised that the Beauty Culture Chapter permits any municipal government in this state to pass and enforce reasonable laws and regulations governing the beauty culture practice within its limits. An examination has been made of the charter of said city and by the provisions thereof it may license and tax professions. Not having any more of the pertinent facts before me at this time, it would be my judgment that the permit imposed by the city aforesaid is not in conflict with the Beauty Culture Law.

It is also my conclusion that a barber may work in a beauty salon and cut hair only.

January 3, 1944.—044-2.

**BEAUTY SHOPS OPERATED BY PERSONNEL OF WOMEN'S ARMY  
CORPS—APPLICATION**

**QUESTION:** Does the Florida Beauty Culture Law apply to a beauty shop at Tyndall Field Reservation operated for personnel of the Women's Army Corps by personnel of the detachment?

*To Miss Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture:*

Your attention is called to the circumstances that exclusive jurisdiction over Tyndall Field has been ceded by Florida to the United States.

The Beauty Culture Law was enacted under the reserved police power of the State. However, this power does not embrace activities on lands over which the United States has by cession or otherwise acquired exclusive jurisdiction and has not relinquished such jurisdiction. *Pacific Coast Dairy, Inc., v. Department of Agriculture of California*, decided March 1, 1943, not yet reported.

In addition, when there is a cession, by a state to the United States, of jurisdiction over lands held by the latter for military purposes, a state surrenders its claim of right to exercise legislative authority and puts that



area beyond the field of execution of her laws. *Standard Oil Co. v. California*, 291 U. S. 242, 245, 78 L. Ed.

Accordingly, I do not believe beauty culture operations at Tyndall Field may be controlled in any way by the law prevailing in this state.

January 4, 1944.—044-4.

#### EXAMINATION AND CERTIFICATE FEES—REFUND

**QUESTION:** May a refund of examination and certificate fees be granted where the applicant no longer wishes to take the examination?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

Authority is given to the Comptroller by Chapter 22008, Acts of 1943, to make refunds to persons of any money paid into the State Treasury constituting an overpayment of any tax, license, or account due; a payment where no tax, license, or account is due; or any payment made into the State Treasury in error.

It seems clear that the situation presented would compose a payment where no tax or license is due. Thus, if the Board deems the request for refund justified, application therefor, on form provided by such officer, should be filed with the Comptroller.

July 10, 1943.—043-158.

#### EXAMINATION FEES

**QUESTION:** Should a fee be charged for the issuance of a beautician's certificate to a person who has passed an examination and been issued a certificate as a beauty culture teacher?

2. Is a person entitled to take an examination as a junior operator or beautician without paying the examination fee, where such person has already paid the \$40.00 fee for an examination as a manicurist and pedicurist?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

1. This office has heretofore rendered an opinion to the State Board of Beauty Culture in which it held that a beauty culture teacher should be issued a certificate of registration as a beautician upon the payment of an additional fee of \$5.00, and I know of no reason to reverse my original opinion on this subject.

2. The examination for a manicurist and pedicurist and the examination for a junior operator or beautician are two separate examinations relating to separate fields within the practice of beauty culture and there is nothing contained in the Florida Beauty Culture Law which provides that a person who has taken a manicurist and pedicurist examination may subsequently take an examination as a junior operator or beautician without paying the examination fee required by law.

I am, therefore, of the opinion that a beauty culture teacher upon passing the examination as such is also entitled to a certificate of registration as a beautician upon the payment of an additional fee of \$5.00 and further, that a manicurist and pedicurist who has paid the examination fee as such must also pay the fee provided by law to take an examination as a junior operator or beautician.

July 16, 1943.—043-167.

#### EXEMPTION FROM MESSAGE REGISTRATION LAW

QUESTION: 1. Are beauty shops and beauticians exempt from the provisions of the Message Registration Act of 1943, Chapter 22034, Acts of 1943, where such beauty shops and beauticians are engaged in the work of massaging and slenderizing?

2. Is a beautician who demonstrates the use of a slenderizing machine required to qualify and be licensed under the Message Registration Act?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

I am advised that massaging is used in slenderizing and under the provisions of Chapter 477, Florida Statutes, 1941, the Florida Beauty Culture Law, beauticians and beauty shops are permitted to practice massaging. Section 4 of Chapter 22034, the Message Registration Act of 1943, expressly exempts licensed beauticians, licensed barbers, registered nurses, and certain others enumerated therein from the provisions of this Act, and Section 19 thereof provides that nothing in this Act shall be construed or interpreted as changing, modifying or repealing any of the provisions of Chapter 477 of Florida Statutes, 1941, the Beauty Culture Law.

There is nothing contained in either the Message Registration Act of 1943 or the Florida Beauty Culture Law regulating the demonstration of mechanical slenderizing machines.

I am, therefore, of the opinion:

1. That beauty shops and beauticians engaged in the practice of massaging or slenderizing come under and are regulated by the provisions of the Florida Beauty Culture Law and are not affected or regulated by the Message Registration Act of 1943, and

2. That the demonstration of a mechanical slenderizing machine does not constitute the practice of beauty culture or massaging within the provisions of either the Florida Beauty Culture Law or the Message Registration Act of 1943 and is not affected or regulated by either law.

October 19, 1943.—043-273.

#### JUNIOR OPERATOR—CERTIFICATE OBTAINED; MISREPRESENTATION

QUESTION: What remedies are afforded where one obtains a certificate of registration as a junior operator upon fraudulent misrepresentations?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

It appears that a certain person, not having graduated from an eighth grade grammar school or having its equivalent in education as determined by an examination conducted by the Board, in making application for permit to enter a school of beauty culture, fraudulently used her sister's high school report card and eventually a certificate of registration as a junior operator was issued to her.

Obviously, said person has no valid certificate of registration, having obtained the certificate granted under a name other than her own.

The Board, under Section 477.27, as amended, Florida Statutes, 1941, may proceed against this person for obtaining said certificate of registration by fraudulent misrepresentation, or for unlawfully practicing as a junior operator without a certificate of registration, both being misdemeanors.

The Board may also, under Section 18, Chapter 21894, Acts of 1943, enjoin one practicing as a junior operator without a certificate of registration, or, by injunction, prevent one from practicing who has obtained a certificate by fraudulent misrepresentations.

You would be warranted, I believe, in advising this operator that, upon a search of the records, the Secretary has found no certificate of registration as a junior operator issued in her name, and requesting her to desist immediately from practicing as a junior operator. Upon failure to desist, prosecution for misdemeanor or injunction may be brought.

October 23, 1943.—043-239.

#### JUNIOR OPERATOR'S PERMIT—ISSUANCE TO NONRESIDENT

**QUESTION:** May an operator, qualified as a beautician, who has attended an accredited beauty culture school and is able to present proper school records and affidavits certifying beauty culture practice for twelve months, if said operator is from a state which does not issue licenses, upon payment of the required fee, be granted a permit to work as a junior operator until date of next beautician's examination?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

In the first paragraph of Section 477.12, Florida Statutes, 1941, as amended, among other requirements, I find that a person having a license or certificate of registration as a practicing beautician from another state, which has substantially the same requirements for licensing or registering beauticians as are necessary in Florida, shall, upon payment of the necessary fee, be issued a permit to practice as a junior operator until called by the Board for a beautician's examination.

It is clear that it was the Legislature's purpose that nonresident applicants, from states having fundamentally the same beauty culture training and practice requirements as are essential in this state, should be permitted to take the beautician's examination, and permits issued to them to practice as junior operators in the interim. Bearing this intentment in mind, as to those states which do not issue licenses, where it is ascertained that an applicant has attended an accredited beauty culture school, is able to present proper school records and affidavits certifying beauty culture practice for twelve months, and who has the other qualifications of Section 477.12, it is my belief that the intent of the Legislature has been met and the applicant should be issued a junior operator's permit pending a future examination.

My conclusion is, consequently, that an individual submitting the equivalent qualifications detailed, upon payment of the required fee, may be issued a junior operator's permit until the date of the next beautician's examinations.

September 25, 1944.—044-286.

#### MANICURING AND PEDICURING

**QUESTION:** May a registered beautician open a shop for manicuring and pedicuring only, and display a sign to read "Manicuring and Pedicuring Only"?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

You are advised that I have found nothing in the Beauty Culture Law which would prevent a registered beautician from limiting his or her practice to that of manicuring and pedicuring and from opening a shop for that purpose only. Having arrived at this conclusion, I do not see how a sign, such as the one mentioned, could be objectionable.

October 9, 1943.—043-266.

**NONRESIDENT MANICURIST AND PEDICURIST—PERMIT TO PRACTICE**

**QUESTION:** May a permit be issued to a manicurist and pedicurist to practice until called by the Board for an examination?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

The only reference I found in the statute to a permit to be issued to a manicurist and pedicurist appears in Paragraph (6), Section 477.02:

"It shall be unlawful for any person . . . to hire or employ any person to engage in the practice of beauty culture . . . unless such person holds a . . . permit to work as a manicurist and pedicurist, issued under the provision of this chapter." (Emphasis supplied.)

Although these operators are dealt with in other respects, a permit to practice until examination was not included in Section 477.12 with other permits that shall be issued.

The Legislature plainly intended to provide for a permit for a manicurist and pedicurist and this intention, which constitutes the law of any statute, should be achieved. We find in *Cassady v. Sholtz*, 124 Fla. 718, 169 So. 487:

"The implications and intendments of a statute are as effective as are the express provisions."

The conclusion is reached that by intendment of the Legislature a permit may be issued to a manicurist and pedicurist until called by the Board for examination.

June 16, 1944.—044-171.

**RIGHT OF MUNICIPALITIES TO IMPOSE ADDITIONAL LICENSE**

**QUESTION:** May municipalities impose a license upon a beauty culture teacher who has been granted a certificate of registration by the State Board of Beauty Culture?

*To Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture:*

Municipal governments, when clothed with the requisite legislative authority, may have the power to license and such power may be concurrent with like power in the State. In accordance with this rule, within the boundaries of a state, the same person may be required to procure separate state and city licenses for the same occupation.

It is well established also that the Legislature may delegate power to municipalities to grant licenses for particular professions and such power has been granted by our Legislature, it being provided by Section 477.24, Florida Statutes, 1941, that a municipal government in this state may pass and enforce reasonable laws and regulations governing beauty culture practice within its limits.

It is my belief, accordingly, that municipalities in this state having sufficient charter provisions are empowered by statute to license beauty culture teachers already registered by the State Board.

July 14, 1944.—044-205.

**SALE OF GIFTS, ETC., IN BEAUTY SHOPS**

**QUESTION:** May such articles as gifts, handbags, and jewelry be placed on sale at a beauty shop?



To Miss Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture:

Through Section 477.27, Florida Statutes, 1941, it is made a misdemeanor to use any room or place for beauty culture which is also used for residential or business purposes not connected with beauty culture, unless a partition of ceiling height, which has been approved in writing by the Board or its representative, separates the portion used for residential or business purposes from the room or portion used for beauty culture.

It is my opinion, that no sale may be made of the above mentioned articles in any room or place where beauty culture is practiced, unless the prescribed partition is installed.

November 18, 1943.—043-306.

#### TEACHERS—PAYMENT

QUESTION: Would the payment to teachers of a small percentage of the weekly gross receipts of beauty culture schools from floor or clinic work, performed by students, in addition to a flat weekly salary, be in violation of law?

To Miss Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture:

This consideration seems to deal with agreements reached between beauty culture schools and teachers, and with the compensation of teachers, neither of which is regulated by the Florida Beauty Culture Law.

The result of my inquiry induces me to advise you that the Board has no jurisdiction over these matters.

August 5, 1943.—043-192.

#### TEACHERS—PREREQUISITES FOR CERTIFICATE

QUESTION: May an applicant, who was engaged in the practice of beauty culture prior to the passage of Chapter 16800, Acts of 1935, now receive a beautician's certificate without examination?

To Miss Ethel M. Manning, Executive Secretary, State Board of  
Beauty Culture:

It appears that under Chapter 16800, Acts of 1935, on February 4, 1936, an applicant was granted, without examination, a certificate to teach beauty culture. This license expired August 1, 1937, no renewal having been requested as required by Section 14 thereof.

Section 14, (Section 477.14, Florida Statutes, 1941), further states that "any registered teacher who retires from teaching for not more than five years may renew his or her certificate upon the payment of the required restoration fee." Although applicant's right to restoration expired August 1, 1942, this section was amended by Section 10, Chapter 21984, Acts of 1943, extending the time to eight years for renewal of an expired certificate. She is, therefore, entitled to renewal of her beauty culture teacher's certificate.

In addition, you state, she seeks a beautician's certificate of registration.

Section 12, Chapter 16800, Acts of 1935, also permits the Board to grant to any person who has been practicing beauty culture six months continuously before the passage of the Act a certificate of registration as a registered beautician, without examination.

It is observed that the applicant did not apply for a beautician's certificate, but only to teach. Her opportunity has expired, as application had to be made on or before October 1, 1935, and, to receive a beautician's certificate now, she must qualify under Section 477.06 (1) or (2) (h), Florida Statutes, 1941, as amended in 1943.

By an opinion of this office appearing in the Biennial Report of 1941-1942, pages 647, 648, and one supplemental thereto, dated July 10, 1943, when one takes and passes the examination for teacher of beauty culture, such person is entitled to receive a beautician's certificate, on payment of the additional fee, because the teacher's examination covers the same subjects upon which a beautician must be examined.

Here no teacher's examination was taken, because of exemption, and these opinions are inapplicable to the present case.

My opinion is that at the time the exemption from examination was available, it was the applicant's duty and privilege to secure the certificates she might need in the future practice of her profession, and that now it is necessary for her to take an examination conducted by the Board to determine her fitness to practice beauty culture.

### PHOTOGRAPHY

October 20, 1943.—043-277.

### LICENSE INSPECTORS—COMPENSATION

**QUESTION:** May the Board of Photographic Examiners employ license inspectors and fix their compensation on a commission basis with an additional five cents per mile when traveling?

*To Honorable Al P. Burgert, Chairman, Florida State Board of Photographic Examiners, Tampa, Florida:*

Section 478.07, Florida Statutes, 1941, contains this statement:

"The board may appoint and, at its pleasure, remove any technical, legal or other assistant as may be necessary to carry out the provisions of this chapter and prescribe their powers and duties and fix their compensation."

It seems that it is within the power of the Board to appoint license inspectors and fix their compensation, but not on a commission basis.

By Chapter 21913, Acts of 1943, state employees are allowed six dollars (\$6.00) subsistence per diem and, when using a privately owned car, mileage at the rate of five cents per mile. It is further provided that the Board may reduce such per diem allowance for any class of employees.

According to Section 478.08, Florida Statutes, 1941, all expenses of administration must not exceed the income derived from examination fees, license fees and penalties.

Supplementing the information supplied, it is my belief that the funds collected by your Board should be deposited with the State Treasurer. This position is taken by reason of Section 116.01, Florida Statutes, 1941, shown herewith:

"Every state and county officer within this state, authorized to collect funds due the state or county, shall pay all sums officially received by him into the state or county treasury promptly, within thirty days after the first day of the month next succeeding the day receiving the same."

Upon the examination and audit of accounts and claims duly approved by the Board, the Comptroller would be authorized and required to issue his warrant to the Treasurer directing payment of such amounts.

### MASSEURS

March 28, 1944.—044-115.

**QUESTION:** Are members of the Board of Massage entitled to traveling expenses when they find it necessary to personally examine and inspect massage establishments operated in the State?

*To Mr. Eric L. Wickman, Vice President, Florida Board of Massage,  
Miami Beach, Florida:*

The third paragraph of Section 6, Chapter 22034, Acts of 1943, makes this requirement:

"It shall also be the duty of said Board, from time to time, to examine and inspect, or cause to be examined and inspected, all massage establishments and massage schools operated in the State of Florida, and for this purpose, said Board, and its agents and employees, shall have, and they are hereby given authority to enter and inspect . . ."

When Board members find it necessary, for purposes of expediency, to make inspections in performance of their duties, such does not divest them of their status as members of the Board and does not make them inspectors in the sense that they are employees of the Board. They still retain their original classification.

A statutory grant of power carries with it by implication everything necessary to its exercise and, although not expressly provided, board members are entitled to traveling expenses while making inspections. State officers, when traveling within the State of Florida on state business, are allowed a subsistence of six dollars (\$6.00) per diem and mileage, when using privately owned car, of five cents (5c) per mile. A transportation request should be procured from the State Comptroller when traveling by railroad, bus, or other common carrier. The Board, in its judgment, may reduce such per diem allowance above. All expenses shall be paid from the fund created by the various fees collected by the Board in the administration of the Massage Registration Act.

It is my view, therefore, that the question above may be answered in the affirmative.

December 28, 1943.—043-341.

### BONA FIDE CITIZENS—REGISTRATION; EXEMPTIONS

**QUESTION:** 1. Is it lawful to allow aliens, formerly licensed masseurs under various municipal ordinances, to make application for registration to practice massage in view of the act regulating masseurs, Chapter 22034, Acts of 1943, which requires an examination before registration, and as a prerequisite thereof that the applicant must be a bona fide citizen of the United States?

2. Does the provision for "apprentices" in Section 3 (d) permit aliens to practice massage?

*To Mr. Paul Steele, Secretary-Treasurer, Florida Board of Massage,  
Miami, Florida:*

Section 7, Chapter 22034, enumerates the requisite qualifications of an applicant to receive a certificate of registration as a masseur or masseuse, and one of these is bona fide citizenship of the United States. Examination under the direction and supervision of the Board is also included.

However, Section 20 of the chapter provides that any person, resident of this state, who has for two (2) years immediately preceding the passage of this Act, engaged in the practice of massage, shall be granted a certificate of registration, without examination, as a registered masseur or masseuse, if application is made to the board on or before October 1, 1943.

Obviously, if any of the persons of whom you write could and did comply with Section 20, they may be issued a certificate of registration.

As to those who made no effort, or were unable, to conform with Section 20, it is my opinion that they must bring themselves within the terms of Section 7, and must complete their admission to citizenship, together with observing the other requisites named, before they may be granted registration. It must be observed that filing a declaration of intention does not entitle one to the privileges and benefits of citizenship.

With respect to the second question above, my study of the chapter revealing no limitation upon who may be apprentices, it is my conclusion that aliens may be apprenticed for not more than two hundred and seventy working days of service in a properly licensed massage establishment or school. Apprenticeship has been described by our Supreme Court, in *State v. Jones*, 16 Fla. 306, 318, to mean

"regular, faithful, and active service . . . with a purpose to secure knowledge and skill . . ."

Under the generally accepted definition that an apprentice is a learner or beginner, it would seem inappropriate for the Board to pass upon anyone as an apprentice except one who is a learner or beginner. If this policy were adopted, coupled with the limitation of two hundred and seventy working days mentioned, it is difficult to perceive how anyone could evade the law and practice massage while serving as an apprentice.

March 22, 1944.—044-93.

#### INSPECTOR'S FEES

QUESTION: May members of the Board of Massage under Chapter 22034, Acts of 1943, receive pay for making inspections?

*To Honorable J. M. Lee, State Comptroller:*

I have examined Chapter 22034, as requested, and it is my opinion that a member of the Board is not eligible to serve as an inspector nor to receive pay for making inspections.

October 27, 1943.—043-284.

#### REGISTRATION BY STATE BOARD OF HEALTH—FEE

QUESTION: Is the State Board of Health required to register practitioners of the masseurs' art, and if so, may a fee be charged therefor, similar to the fee charged for registering practitioners of the healing arts?



*To Dr. Henry Hanson, State Health Officer:*

Section 7 of Chapter 22034, Laws of Florida, Acts of 1943, requires all masseurs to be registered with the State Board of Health before practicing in this state, such registration to be evidenced by a certificate issued by said Board. No provision is made in the Act for the payment of any fee for such registration or certificate, nor can I find any other authority for the making of such charge.

The Legislature has found it wise to regulate the practice of massage and, presumably because of its relation to the public health, has required registration with the State Board of Health. It is my opinion that Section 7 of Chapter 22034, *supra*, sufficiently imposes upon your Board the duty of registering such practitioners, on proper application, and issuing the required certificate.

With reference to the charging of a fee for such service, it is a general rule that fees charged and collected by officers represent the charge which the State makes for services rendered by it through its officers, and that public officers have claim for official services only when the law provides compensation, such services being deemed gratuitous otherwise.

Various statutes regulating practitioners of the healing arts require registration with the Board and specifically authorize the making of such a charge. However, in the absence of any such specific authority as related to masseurs, it is my opinion that the Board is not authorized to make any charge for the services referred to herein.

## CHAPTER XXV

# REGULATION OF TRADE, COMMERCE AND INVESTMENTS

### MILK, CREAM AND MILK PRODUCTS

October 16, 1944.—044-304.

#### FLORIDA STATE COLLEGE FOR WOMEN

QUESTION: 1. What tax must be paid, or what permit secured in order to serve colored or uncolored oleomargarine in the college dining room?

2. Does the State permit the employment of college students as waitresses in public restaurants without pay other than meals and tips?

*To Mrs. Anna M. Tracy, Dietitian, Florida State College for Women:*

It is not necessary for the College to pay a tax or to get a permit to serve oleomargarine in its dining hall.

Section 502.05, Florida Statutes, 1941, prohibits the coloring of oleomargarine, but this does not prohibit the purchase of such oleomargarine or its being served in your dining room so long as you do not add the coloring. Oleomargarine comes within the statutory definition of imitation butter. If you conducted a restaurant or eating place serving the general public, Section 502.07 would apply. That section requires the display at all times opposite each table or place of service a placard for each imitation with the words "Imitation \_\_\_\_\_ served here," and specifies the size and style of the type to be used on such placard. The duty of enforcing these statutes rests upon the Department of Agriculture. I might add that inquiry at said Department discloses that your institution is not regarded as being within the scope of these statutes or requirements.

There appears to be no statute covering the situation mentioned in your second question. It is answered in the affirmative.

January 4, 1944.—044-8.

#### MANUFACTURE AND SALE OF COLORED OLEOMARGARINE

QUESTION: May colored oleomargarine be imported into the State?

*To Honorable J. Rex Farrior, State Attorney, Tampa, Florida:*

We are assuming that all Federal and State taxes, fees and licenses are paid in all instances considered and no consideration will be given that phase of the question.

Section 502.05, Florida Statutes, 1941, provides: "No imitation butter or filled cheese shall be colored with any substance . . ."

Section 502.01, Florida Statutes, 1941, under the definition of "Imitation Butter" includes oleomargarine within the terms of Section 502.05, Florida Statutes, 1941.

Section 502.27, Florida Statutes, 1941, provides the penalty for violation of the Act and Section 502.28 prohibits the sale of spurious preparations purporting to be butter.

Section 25 under Title 21, Food and Drugs, U. S. C. A., provides:

"All articles known as oleomargariné, butterine imitation, process, renovated or adulterated butter . . . transported into any state or territory or the District of Columbia and remaining therein for use, consumption, sale or storage therein, shall upon arrival within the limit of such state or territory or the District of Columbia, be subject to the operation and effect of the laws of such state or territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such state . . . and shall not be exempt therefrom by reason of being introduced therein in original packages (May 9, 1902, C 784, # 1, 32 Stat. 193; Feb. 10, 1925, C 200, 43 Stat. 827)."

This Federal Statute modifies the "Bulk Package Doctrine" to the extent that oleomargarine and imitation butter brought into the State of Florida and remaining therein are subject to the laws of the State enacted in exercise of its police powers.

The weight of authority is, that it is an unlawful interference with interstate commerce for a state to prohibit absolutely the introduction of oleomargarine from another state and its sale in the original package as oleomargarine, though it may lawfully enact legislation designed to insure the purity of the imported product and to prevent the deceptive sale of even pure oleomargarine as butter. Annotation 53 ALR 480, *Scholenberger v. Penn.* 43 L. ed 49, *Collins v. N. H.* 43 L. ed. 60.

States seem to have authority to prohibit manufacture, sale or importation of colored oleomargarine, but a consideration of the statutes of this state reveals no intention of our Legislature to prohibit the shipment of colored oleomargarine into this state.

It is therefore my opinion that while the laws of this state prohibit the manufacture and sale of colored oleomargarine within the State, they do not prohibit the importation by the importer of colored oleomargarine. Only in cases where the importer resold colored oleomargarine within the State would he be subject to the penalty of State Laws, and sale of such merchandise by anyone is likewise prohibited.

### HOTEL COMMISSION

February 7, 1944.—044-44.

#### RESTAURANTS OPERATED AT SHIPYARDS

**QUESTION:** Are restaurants, lunch stands and cafeterias operated by a shipyard in Hillsborough County, Florida, subject to the jurisdiction of the Hotel Commission?

*To Honorable George H. Clements, Commissioner, State Hotel Commission:*

It would appear that the shipyard and cafeterias in question are being operated by a certain company as agent for the United States Maritime Commission.

The State of Florida has not surrendered its jurisdiction or authority over the area occupied by the shipyard where such restaurants and cafeterias are situated. The State of Florida may, therefore, in the interest of public health enforce within such areas the State's valid police regulations. The license and inspection fees required to be paid by Sections 511.03 and 511.08, Florida Statutes, 1941, are required for the purpose of covering the costs of state inspection and supervision of places where food is sold or offered for sale to the public. This requirement is made in the exercise of the State's police power. Under which power the State of Florida has the authority to enact reasonable regulations and require-

ments for the protection of the health of its citizenry. If the company, as the agent of the United States Maritime Commission, desires to operate a cafeteria at the shipyard, such operation must be made to conform to the valid rules and regulations of the State Hotel Commission and thus extend to its workmen the public health protections and safeguards that are provided by law.

It is my opinion that the State Hotel Commission has jurisdiction over any restaurant, lunch stand or cafeteria being operated by said company at the shipyard in Hillsborough County, Florida, and that the operator of such eating establishment may be required to permit the inspectors of the State Hotel Commission to inspect such establishment and be further required to pay to the Hotel Commission the license fees required by law to cover the incidental costs of such public health service.

### HOTELS, RESTAURANTS, APARTMENTS; REGULATIONS

February 18, 1943.—043-48.

#### HOTEL COMMISSION—PROSECUTIONS

**QUESTION:** Is it the duty of the State Attorney or his Assistant to institute prosecution against one in Broward County, who has violated the provisions of Section 511.41, Florida Statutes, 1941?

*To Honorable Louis F. Maire, Assistant State Attorney, Fort Lauderdale, Florida:*

Section 511.41 provides: "**Penalty for violation of laws, rules or regulations.**—Any owner, manager, agent or person in charge of a hotel, apartment house, rooming house, restaurant, lunch or sandwich stand or counter who shall obstruct or hinder any deputy hotel commissioner in the proper discharge of his duties imposed by law or who shall fail or neglect or refuse to pay the license fee for inspection required by law, or who shall fail or refuse to perform or carry out any duty imposed upon him by law, or the rules and regulations authorized thereunder, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than ten dollars, nor more than fifty dollars, or shall be imprisoned in the county jail for not less than ten days nor more than ninety days. Every day that such a hotel, rooming house, apartment house, restaurant, lunch or sandwich stand or counter shall be operated in violation of law, or rules and regulations authorized thereunder shall constitute a separate offense."

It is apparent that the offense denounced by the above section is a misdemeanor.

In counties where Criminal Courts of Record are not established, the County Court has trial jurisdiction of all misdemeanors. The Prosecuting Attorney of the County Court is charged with the duty of prosecuting all criminal cases pending in said Court. The only method provided by law whereby a prosecution in a County Court may be instituted is upon an indictment returned by the Grand Jury, or upon an information filed by the County Prosecuting Attorney. (See Sections 34.01, 34.12, 34.13, Florida Statutes, 1941.)

It is my opinion, therefore, that a State Attorney or Assistant State Attorney is not authorized to institute criminal proceedings in Broward County for a violation of the section above quoted.

The Hotel Commission is authorized by statute to institute proceedings by mandamus or injunction, whenever such proceedings may be necessary to the proper enforcement of the provisions of Chapter 500, Florida Statutes, 1941, or of the rules, regulations, and orders lawfully entered and promulgated by the Hotel Commissioner under the authority of said chapter. When it is deemed necessary to institute such proceedings, the State Attorney, among other Prosecuting Attorneys, is charged with the duty of representing the Commission in such litigation. See Section 511.31, Florida Statutes, 1941.



September 22, 1943.—043-254.

#### LICENSES—RESTAURANTS

**QUESTION:** Two or more cafeterias are about to be set up in a shipyard in Jacksonville for the sole purpose of feeding shipyard workers. Should these cafeterias come under the jurisdiction of the State Hotel Commission and be licensed?

*To Honorable Hunter G. Johnson, State Hotel Commissioner:*

Under the provisions of Section 511.02, Florida Statutes, 1941, a restaurant is defined to be any place or location kept, used, maintained as, advertised as, or held out to the public to be a place where meals, lunches or sandwiches are prepared or served. Section 511.03, Florida Statutes, 1941, requires the payment of a license by every person engaged in the business of conducting a restaurant. The statute does not exempt from its operation any restaurant that may be engaged in rendering exclusive service to any particular group of citizens.

It is therefore my opinion that those cafeterias referred to in your letter are subject to the jurisdiction of the State Hotel Commission and the payment of a license as required by Sections 511.03-511.08, Florida Statutes, 1941.

November 3, 1943.—043-295.

#### OLEOMARGARINE—SERVICE IN SCHOOL LUNCHROOMS

**QUESTION:** What Federal and State Laws are applicable to the service of oleomargarine colored and/or uncolored in school lunchrooms and nursery schools operated as a part of the school system of Florida?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The applicable Federal Laws are:

1. Section 2302 (3), U. S. C. A. Every manufacturer shall place a label on each package which label shall give notice that "Each person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases."

2. Section 2305, U. S. C. A. "Whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to utterly destroy the stamps thereon . . ."

3. Section 2308 (b), U. S. C. A., makes it unlawful for any person to "remove any such label so fixed from any such package," with a penalty of \$50.00 as to each package.

4. Section 2308 (c) makes it unlawful to wilfully remove or deface the stamps, marks or brands on any package and provides a penalty of not less than \$100.00 nor more than \$2,000.00 and imprisonment of not less than 30 days nor more than six months.

5. Section 2308 (e) makes it unlawful for any person to purchase or receive for sale any oleomargarine which has not been branded or stamped according to law and provides a penalty of \$50.00 for each offense.

6. Section 2308 (f) makes it unlawful to knowingly purchase or receive for sale any oleomargarine from any manufacturer who has not paid the special tax required under Section 3200 (a), Chapter 27, with a penalty of \$100.00 for each offense.

7. Section 2308 (g, 1) provides a penalty for "any person who wilfully neglects or refuses to destroy utterly the stamps on any empty package which contained oleomargarine" of not to exceed \$50.00 or imprisonment of not less than 10 days, nor more than six months for each offense.

8. Section 2308 (g, 2) provides a penalty for "any person who wilfully neglects or refuses to destroy utterly the stamps on any empty pack-

age which contained oleomargarine" of a fine not exceeding \$100.00 and imprisonment not more than one year.

9. Section 2309 provides for the forfeiture of all packages found unstamped or unmarked, and for other violations of law.

10. Section 2322, relating to adulterated or renovated butter provides for a notice similar to one mentioned in Section 2302, and makes it unlawful to use the original package or stamps thereon a second time or to remove contents without destroying the stamps.

11. Section 2326 (a, 2) makes it unlawful to remove any such label from any such package, with a penalty of \$50.00 for each package as to which such offense is committed.

State Law applicable:

Section 511.40, Florida Statutes, 1941 provides:

"Use of butter substitutes; penalty.—Any keeper of any hotel, boarding house, restaurant, lunch or sandwich stand or counter, who shall knowingly and wilfully without giving notice to guests at the table, supply oleomargarine or other spurious preparations purporting to be butter for the use of guests, shall be subject to punishment by imprisonment not exceeding thirty days, or by fine not exceeding one hundred dollars."

### SECURITIES

August 16, 1944.—044-233.

#### DEFINITION—EFFECT OF SUPREME COURT DECISION

QUESTION: 1. Did the decision of the Supreme Court of Florida in *Boyer v. Black* (not yet reported) involve the validity of that portion of Section 1, Chapter 21709, Laws of Florida, 1943, relative to a certificate of interest in an oil, gas, petroleum, mineral or mining title or lease, or the right to participate therein, in or on lands situated outside this State?

2. Is the effect of such decision to restore in its entirety Section 517.02 (1), Florida Statutes, 1941, defining the term "security"?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

Chapter 21709, Laws of Florida, 1943, Section 1, defines the "securities" subject to registration and regulation in this state. Such section includes not only the portion embraced in the question but also:

"... oil, gas, and petroleum leases on lands situated outside this State, offered for sale to the public by a dealer or salesman in this State ..."

The quoted definition was the only part of said Section 1 before the Court and that portion of the section about which you inquire was not referred to in the decision. In *South Florida Trust Co. v. Miami Coliseum Corporation*, 133 So. 334, the Supreme Court said that it will not pass upon the constitutionality of a portion of a statute not before it. Consequently, it is my opinion that the decision, in *Boyer v. Black*, held unconstitutional that part of Section 1 quoted above, but did not involve the validity of that part of said section specified in your question.

2. The aforesaid Section 1 is a complete restatement and revision of the definition of the term "security" as such term was defined in the statute amended by said section, and, under the holding of the Supreme Court of Florida in *re Wade*, 7 So. 2d 797 said Section 1 by implication of law has superseded the definition of such term in the amended statute.

Moreover, the definition of such term in the amended statute is in conflict with the restated and revised definition in said Section 1 with respect to the extent of the jurisdiction of the Commission over the "securities" mentioned in your first question, and as a result that part of the amended statute which conflicts with said Section 1 is repealed by the express provision of Section 4 of the aforesaid chapter.

In view of the foregoing, it is my opinion that Section 517.02 (1), Florida Statutes, 1941, is in no way restored, and that Section 1, Chapter 21709, Laws of Florida, 1943, with the deletion therefrom of that part of such section quoted heretofore, is the definition of the term "security" as used in the Uniform Sale of Securities Law.

November 29, 1943.—043-322.

#### DEPOSITS—SUBSTITUTION

**QUESTION:** In opinion number 042-221, which was written by the Attorney General May 7, 1942, and which opinion appears on page 681 of the Biennial Report for 1941-42, it was held that the Florida Securities Commission had no legal authority to authorize any change whatever in the bond or deposit required by dealers under Section 517.14, Florida Statutes, 1941, from which possible claimants are entitled to satisfy their claims under the statute.

It has been requested that the aforesaid opinion be reconsidered because the holding in same might tend to work a hardship upon the public in case of a sharp break in the securities market because the Florida Securities Commission could not authorize any change whatever in the deposit, and, therefore, could not require the deposit of additional securities to keep the value of such deposit up to the required amount.

*To the Florida Securities Commission:*

The opinion referred to did not purport to pass upon your right to require additional deposits in order that the value of deposited securities be kept at a certain level, but dealt only with the question of changing the form of security after the rights of possible claimants had become fixed.

Once a claimant has established his claim against a dealer, it would be a simple matter to satisfy such claim out of securities owned by the dealer and deposited with the Commission for the protection of those having transactions with such dealer; whereas, on the other hand, all sorts of defenses might be raised in a proceeding against a retroactive bond, and considerable litigation might follow. Therefore, after the liability period has expired and the securities are being held merely for the protection of possible claimants, it is my opinion that the Commission may not permit the substitution of a retroactive bond for the securities so held.

February 19, 1944.—044-59.

#### EVASION OF LAW

**QUESTION:** 1. Is the sale of lots and the subsequent issuance of one share of stock in a corporation for each lot owned, an evasion of the law requiring the qualification of all stock with the Florida Securities Commission before offering the same for sale to the public?

2. Is the above operation in violation of any of the provisions of the Securities Law?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

In answer to your first question I wish to advise that the so-called agreement appears to contemplate the sale of one lot and one share of stock. I do not see how any other interpretation could be placed upon it because there must be something of value given or paid to a corporation before it can issue a share or shares of stock and part of the so-called consideration for the lot is held for the use and benefit of the proposed corporation, which simply means that this is the consideration for the stock to be issued. I therefore answer your first question in the affirmative.

This renders unnecessary an answer to your second question.

March 30, 1944.—044-108.

### FLORIDA SECURITIES COMMISSION

QUESTION: How are the following terms: "Investment Adviser," "Investment Counsel," and "Investment Counsellor," defined in Chapter 21709, Acts of 1943 (Section 517.02, 1943 Supplement, Florida Statutes, 1941)?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

By Chapter 21709, Laws of Florida, Acts of 1943, the definition of "dealer" as used in the Uniform Sale of Securities Law was amended to include "Investment Adviser," "Investment Counsel" and "Investment Counsellor" in the following language:

"'Dealer' shall include 'Investment Advisor' and 'Investment Counsel' and 'Investment Counsellor' which is hereby defined to be every person who in this State for compensation engages in the business of advising others either directly or indirectly or through publications or writings as to the value of securities, or as to the advisability of investment in or purchasing securities, and every person other than a certified public accountant who issues or promulgates analyses or issues reports concerning securities; provided the term 'Dealer' shall not include any licensed practicing attorney who renders or performs any of said services in connection with the regular practice of his profession, nor to a wholesaler selling exclusively to Dealers, nor to a person buying and selling securities exclusively through a registered Dealer or Stock Exchange."

You advise that a firm in Jacksonville, Florida, is performing the services described in the definition of "Investment Adviser," "Investment Counsel" and "Investment Counsellor"; that this firm has been requested to register with the Florida Securities Commission; and that the firm in question claims it is not subject to the provision of said Chapter 21709 for seven listed reasons. These reasons may be restated briefly as follows:

1. That it was not the legislative intent in such act to include investment counsel whose activities are limited to such as those engaged in by this firm.
2. That any attempt to include the activities such as this firm's within the operation of said act would constitute an unreasonable, arbitrary and unconstitutional classification, and would be unconstitutional as violating the provisions of Section 1, Declaration of Rights, Florida Constitution.
3. That the reference in the act to "Investment Adviser," "Investment Counsel" and "Investment Counsellor" if intended to cover activities such as this firm's, would be unconstitutional because not included or properly referred to in the title of the Act, and not germane to the subject matter of the Act.

You inquire if the objections are well taken. The objections are answered in the order numbered:

1. From the information furnished, it appears that the activities of this firm fall within the above definition of "Investment Adviser," "Investment Counsel" and "Investment Counsellor," hence, this firm's type of service appears to bring it within the definition of "dealer" as above set forth.

2. Since it is my opinion (see succeeding paragraph 3 hereof) that the above Chapter 21709 is constitutional from the standpoint of title and substance with respect to services rendered by this firm, as I understand the nature of such services, it is my further opinion that the inclusion of activities of this firm within the operation of the Act does not



constitute an unreasonable, arbitrary and unconstitutional classification, and is not violative of Section 1, Declaration of Rights, Florida Constitution. Reference is made to the case of *State v. Minge* (Fla.) 160 So. 673 involving the Uniform Sale of Securities Act. In that case this particular phase of the Act was not involved, but the case is in point on this subject.

3. The title of said Chapter 21709 is as follows:

"AN ACT to Amend Section 1 of Chapter 14899, Acts 1931 as Amended by Section 1 Chapter 17253, Acts 1935 as Amended by Section 1 of Chapter 19190, Acts 1939; Section 5 of Chapter 14899 Acts 1931 as Amended by Section 4 of Chapter 17253, Acts 1935 as Amended by Section 2 of Chapter 19190 Acts 1939; Section 11 of Chapter 14899, Acts 1931 as Amended by Section 6 of Chapter 17253 Acts 1935 as Amended by Section 3 Chapter 20960 Acts 1941, Being "An Act Regulating the Sale of Securities and to Make Uniform the Law Relating thereto; and to Repeal Statutes which are Inconsistent herewith."

This method of identifying the subject matter of the Act in the title is sufficient. *State v. County of Duval* (Fla.) 3 So. 193, *Saunders v. Provisional Municipality of Pensacola* (Fla.) 4 So. 801.

Section 1 of Chapter 21709 has to do with definitions of terms used in the Uniform Sale of Securities Law, and is a complete restatement and a publishing at length of Section 1 of the original Act, as amended in 1935 and 1939, as above indicated, with additional amendments supplied by said Section 1, Chapter 21709, included in which definitions is the above definition of "dealer." This complies with Section 16, Article III, Florida Constitution.

The title to the original Uniform Sale of Securities Law (Chapter 14899, Laws of Florida, Acts of 1931), which is repeated in the title to the above amendatory Act of 1943, is as follows:

"An Act regulating the sale of securities and to make uniform the law relating thereto."

In the case of *Nichols v. Yandre* (Fla.) 9 So. 2d 157, it was urged that Section 16 of the Uniform Sale of Securities Law was not germane to the title of the Act and hence, was unconstitutional. The Court in that case in overruling this contention stated in part as follows:

"The general purpose of the organic restrictions to prevent deceit has however predominated, thus it has been said the title need not be an index . . . nor refer to the matter in the body germane to the expressed subject . . ."

Are "Investment Adviser," "Investment Counsel" and "Investment Counsellor" as defined in said chapter germane to the expressed subject? In my opinion, the answer is in the affirmative. The business of such an advisor, counsel or counsellor depends upon the purchase and sale of securities. The advice of such an adviser, counsel or counsellor, as defined above, reasonably in many instances may be as persuasive in influencing others in the purchase or sale of securities as one who actually and actively solicits others to purchase or sell securities. The Uniform Sale of Securities Law was designed by the legislature to protect the investor in securities, not against losses from a fluctuating market, but from any fraud that might be practiced upon him. *Nichols v. Yandre*, supra.

Therefore, it is my opinion that this firm should be required to register with the Florida Securities Commission.

November 30, 1943.—043-319.

#### UNREGISTERED AND NONEXEMPT SECURITIES

**QUESTION:** May a registered Florida dealer legally sell securities which have not been registered in this state and which are not exempt securities under any provision of the Florida Securities Law, to banks, savings institutions, etc., under Section 517.06 (5), Florida Statutes, 1941, as amended, when such dealer is neither the issuer of such securities nor the duly authorized representative of such issuer?

*To the Florida Securities Commission:*

It is clear from Sections 517.07 and 517.12, Florida Statutes, 1941, that securities may not be sold in this state without being registered unless they are either exempt securities or securities sold in exempt transactions.

Prior to the 1943 Amendment (Chapter 21709, Laws of Florida, Acts of 1943), all sales to banks, savings institutions, trust companies, insurance companies, corporations, brokers and dealers, were considered as exempt transactions. However, the 1943 Amendment limited this exemption by requiring that the sale to the enumerated institutions should be made by either the issuer of the securities or by the duly authorized representative of such issuer.

Therefore, it is my opinion that a registered Florida dealer cannot legally sell securities which are neither registered nor exempt, to banks, savings institutions, trust companies, insurance companies, corporations, brokers or dealers, unless the dealer making the sale is either the issuer of such securities or the duly authorized representative of such issuer.

#### COMBINATIONS RESTRICTING TRADE AND COMMERCE

September 23, 1944.—044-283.

##### WHOLESALE—REFUSAL TO SELL TO RETAILERS

**QUESTION:** May wholesalers of beer in an area within the State of Florida refuse to sell beer to retailers who have violated one or more of the Beverage Laws of the State?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

Your inquiry has been examined in the light of the applicable statutes of this state and particularly Chapter 542, Florida Statutes, 1941, regarding combinations restricting trade or commerce, and it is my opinion that the wholesalers to which you refer can decline to sell beer to retailers in the circumstances set forth in the question.

#### DOG AND HORSE RACING

July 20, 1943.—043-174.

##### FUNDS—REPLACEMENT; DEFICIENCY—CALHOUN COUNTY

**QUESTION:** Did the 1943 regular session of the Florida Legislature enact any law providing that counties, receiving less than \$33,000.00 from Race Track Funds, such deficiency occurring since January 1, 1943, may have such deficiency made up, by the State, from other sources?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Since this may affect money previously allocated by the Legislature in support of the public schools and is now directly involved in Calhoun

County, I thought it well to review the various acts passed by the Legislature relating thereto and give you the benefit of my opinion with reference thereto.

The first of these acts is Chapter 21947. In the preamble to the Act it is stated that since 1931 the counties of the State of Florida have received annually approximately \$33,000 each for the carrying on of county governmental and educational functions and have become dependent upon such Funds for the carrying on of such governmental and educational functions, and that due to the war there has been, and will continue to be, a reduction in the revenue derived from taxation of horse and dog racing with the result "that there exists grave danger that the several counties of the State of Florida will not be able to perform the governmental and educational functions heretofore financed by Racing Revenues . . .," and that the responsibility for safeguarding the welfare of the people of the State and continuing the operation of county government and county school systems primarily rests upon the Legislature, and that the Legislature finds that the welfare of the people is imperiled and "county government and county school systems are endangered," and it is the paramount duty of the Legislature to guarantee the functioning of county government and county school systems by providing the funds to offset unexpected losses of revenue due to the war. So the Legislature proceeded to appropriate from the General Revenue Fund certain funds derived from taxes which can be legally dispersed for the purposes mentioned, or from the proceeds of inheritance, estate and intangible taxes, the sum of one million, five hundred thousand dollars per annum during the period that the Act was in force and effect, and it authorized the Comptroller to draw his warrant payable to either the County Commissioners or the Board of Public Instruction, as authorized by law, for a sum of money to bring the counties' allocation from racing up to \$33,000 "for any year during the period in which this act shall be in force." In other words, there was to be added to the amount distributed to each county from funds received from race track taxes a sufficient amount of money so that each county would receive each year the sum of \$33,000.

The Act is to remain in force and effect until the 30th day of June, A.D., 1945. It became effective on its approval by the Governor on June 5, 1943.

Taking into consideration the entire language of this Act, including the preamble, I am constrained to believe, and so hold, that the Legislature intended that this Act should make available for immediate distribution \$1,500,000 to be used prior to December 31, 1943 to bring each county's share from race track money received since January 1, 1933 up to \$33,000, provided, of course, that the appropriation of \$1,500,000 for that purpose is not exceeded. I cannot believe that the Legislature would have made a statement of legislative policy and a finding of fact of the crisis in which the county government and the school systems were, and then not intend that such condition should be immediately remedied under the provisions of the Act.

The next act that was passed is Chapter 22044 and I find quite a preamble to this Act, but it is worded differently from Chapter 21947. I find that this Act created in the State Treasury a public fund to be known as the Counties' Emergency Fund and the Governor was authorized and directed to transfer into this Fund moneys available therefor and not otherwise appropriated up to an amount necessary to provide relief for the several counties, and that he was authorized to lend a sufficient amount of such money to replace "revenue lost to such board or boards from racing and to assist in preventing collapse of essential local governmental and educational functions, during the fiscal years 1943-44 and 1944-45; provided, however, no advancement to any one county for governmental and educational financial aid during any one fiscal year may exceed the difference between the sum actually received in such fiscal year by such county from racing, and the sum of \$33,000; and provided,

further, that any county receiving any such advancement shall agree by resolution or resolutions, adopted by the particular board or boards therein, which are the recipients of racing revenue . . . that said advancement will be repaid by said county over a ten-year period beginning with the statutory racing season of 1947-48, in equal annual installments from such racing revenue, . . .," and the Comptroller is authorized to deduct same from the counties' allotment from racing revenue during such period.

You will note that this advancement of money was only authorized for the fiscal years 1943-44 and 1944-45, and provides that the sum actually received in the fiscal year may be supplemented to bring the amount up to \$33,000 by a loan.

I do not believe that the Legislature intended that this Act take effect prior to either the beginning of the State's fiscal year of July 1, or the counties' fiscal year of October 1, and then only if a deficit should develop in the amount the counties received from racing for the particular fiscal year of 1943-44.

The language, in my mind, cannot be construed as retrospective to take care of any deficit that the counties may have suffered by reason of the fact that they did not get \$33,000 from race track moneys from January 1, 1943 up until the final distribution of same some time in May.

The next act passed was Chapter 22136. There is no preamble to this Act, and it provides for an appropriation for allocation and distribution to the several counties, of a sufficient amount of money to produce to each county \$33,000 per year either from racing or from said Act, and it is apportioned out of funds derived from intangible, inheritance, and estate taxes in such amounts necessary to insure such payment.

It is further provided that a certain Trust Fund created by Section 3 of Paragraph (J) of the General Appropriation Act after provision is made for payment of the appropriation mentioned in this act, that such Fund would then revert to the General Revenue Fund, and it provides that the funds in the Trust Fund created by Section 3, Paragraph (J) of the General Appropriation Act might be transferred by the Budget Commission from time to time to the credit of the General Revenue Fund prior to distribution to the several counties as required, and the effective date of this Act is July 1, 1943.

The Governor vetoed that provision of the General Appropriation Act referred to in this Act; to wit, Paragraph (J) of same. This, therefore, nullified the particular Trust Funds mentioned in this chapter. Since the effective date of this Act was not until July 1, 1943, it is doubtful as to whether or not any moneys could be available thereunder, and then probably only from collections from estate and intangible taxes after that date.

In view of what I have said with regard to this particular chapter, I doubt its availability or usefulness, particularly in view of the other acts that had previously been passed by the same Legislature.

I might add that under Article IX of the Constitution, intangible, inheritance, and estate taxes can be allocated to the counties as the Legislature may provide, so this apparently eliminates any question as to the constitutionality of the three acts mentioned.

August 12, 1943.—043-200.

#### FUNDS—REPLACEMENT; DEFICIENCY—MADISON AND LEON COUNTIES

QUESTION: Is the Board of Public Instruction of Madison County, under Chapter 21835, effective July 1, 1943, and is the Board of Public Instruction of Leon County under Chapter 21836, effective May 24, 1943,



entitled to receive one-half of funds for replacement of the Race Track Funds under Chapter 21947, Acts of 1943, effective June 5, 1943?

*To Honorable Colin English, State Superintendent of Public Instruction:*

It is my opinion that this question should be answered in the affirmative as to both County Boards.

Both Chapter 21835 and Chapter 21836 direct payment to respective County Boards of Public Instruction of one-half of all moneys allocated and distributed under Chapter 14832, Laws of Florida, Acts of 1931, and **acts supplemental thereto**; and Chapter 21836 adds "and such other revenue as may be provided to replace and/or supplement the same."

Enclosed is a copy of my opinion of July 31st, on said Chapter 21947, which answers your inquiry in part and from which I quote:

"Chapter 21947, Laws of Florida, Acts of 1943, as stated in its preamble, proposes to guarantee the continued functioning of county government and county school systems by providing funds in such amounts as shall be necessary to offset the unexpected losses of racing tax revenue due to the war. Section 3 of said act provides that when said replacement moneys are received it shall be the duty of such board or officials to distribute for use such funds in such manner that each distributee will receive the respective amounts contemplated by general or special laws regulating distribution of race track funds. This section clearly contemplates the use of such replacement funds in the same manner as was authorized by general and special law prior to the passage of said Chapter 21947.

"Section 5 of said Chapter 21947 must be construed in connection with other provisions and the general intent and purposes of the act. Said section does not in any way militate against the use of said replacement funds as contemplated by other general or special law authorizing and specifying the use to be made of race track funds."

The provision of Section 5 of Chapter 21947 that "This act shall be construed to be cumulative and supplemental to any and all other acts and laws now or hereafter in effect providing for distribution of funds from the state treasury to the several counties of the State of Florida;" entitles said County Boards to participate and receive said Funds irrespective of the effective dates of the first two mentioned acts.

July 31, 1943.—043-189.

#### FUNDS—REPLACEMENT; DEFICIENCY—PASCO COUNTY

**QUESTION:** Since the race track revenue has diminished and funds are now being used from other sources to supplement the race track revenue as authorized under Chapter 21947, Laws of Florida, Acts of 1943, shall the State Treasurer, as ex officio Trustee of the Teachers' Salary Fund continue to hold money for repayment of a loan to the Pasco County School Board, as authorized under Chapter 20356, Laws of Florida, Acts of 1941?

*To Honorable J. Edwin Larson, State Treasurer:*

Said Chapter 20356 relates also to the racing tax funds accruing to Pasco County, and specifically directs the payment of one-half of all said Race Track Funds to the State Treasurer as ex officio Treasurer of the Teachers' Salary Fund for credit of the Board of Public Instruction of Pasco County, Florida, to be disbursed by warrants of said Board for payment of teachers' salaries, transportation expenses, loans and interest thereon authorized by said Act.

Sections 2 and 3 of said Act specifically authorize the making of a loan by the said Board with said race track funds as security therefor,

for paying salaries and transportation expenses for the school year of 1940-41. Section 5 of said Act directs that the first funds accruing to said Board from said Race Track Funds shall be applied to the repayment of the money borrowed with interest.

Chapter 21947, Laws of Florida, Acts of 1943, as stated in its preamble, proposes to guarantee the continued functioning of county government and county school systems by providing funds in such amounts as shall be necessary to offset the unexpected losses of racing tax revenue due to the war. Section 3 of said Act provides that when said replacement moneys are received it shall be the duty of such Board or officials to distribute for use such funds in such manner that each distributee will receive the respective amounts contemplated by general or special laws regulating distribution of Race Track Funds. This section clearly contemplates the use of such replacement funds in the same manner as was authorized by general and special law prior to the passage of said Chapter 21947.

Section 5 of said Chapter 21947 must be construed in connection with other provisions and the general intent and purposes of the Act. Said section does not in any way militate against the use of said replacement funds as contemplated by other general or special law authorizing and specifying the use to be made of Race Track Funds.

It is my opinion that you should continue to hold supplemental funds received under Chapter 21947, Acts of 1943, for the repayment of the loan made by Pasco County School Board as authorized by Chapter 20356, Acts of 1941.

September 8, 1943.—043-241 and 043-245.

#### FUNDS—REPLACEMENT—DISTRIBUTION TO COUNTY BOARDS OF PUBLIC INSTRUCTION

**QUESTION:** Are the Boards of Public Instruction in Leon and Madison Counties, under Chapters 21835 and 21836, Laws of Florida, Acts of 1943, entitled to receive one-half of the deficit moneys which will be distributed, after July 1, 1943, to said counties from the proceeds of Chapter 21947, Laws of Florida, Acts of 1943, effective June 5, 1943?

*To Honorable J. M. Lee, State Comptroller:*

Chapter 21835 provides that one-half of all Race Track Funds allocated to Madison County shall be paid to the Board of Public Instruction of that county; and chapter 21836 provides that the Board of County Commissioners of Leon County shall pay to the Board of Public Instruction of that county one-half of the moneys thereafter allocated to said county from Race Track Funds.

It appears from the preamble of Chapter 21947 that said act "proposes to guarantee the continued functioning of county government and county school systems by providing such funds as shall be necessary to offset unexpected losses of revenue due to the war and insure the continuance of those county functions which are necessary and essential to the welfare of the public in the State."

Chapters 21835 and 21836 must be construed with Chapter 21947, all Acts of 1943. The latter Act clearly contemplates the use of such replacement funds in the same manner as was authorized by the general and special laws applicable to the fiscal year for which loss of funds is being made up and replaced. When the School Boards made up their budgets for the fiscal year ending June 30, 1943, no revenue was authorized or anticipated for their budgets from Race Track Funds. The same was payable to the county to be expended as the County Commissioners should determine. Therefore, after the effective dates of Chapters 21835 and

21836, said School Boards had no loss of Race Track Funds; and the expressed purpose of Chapter 21947 would be defeated if the County Commissioners were paid only one-half of said replacement funds because the deficit in revenue necessary to insure the continuance of those county functions provided for in its 1942-43 budget would only be one-half satisfied.

It is my opinion that the said County Boards of Public Instruction are not entitled to receive one-half of the Race Track Funds allocated to said counties for the budget year 1942-43.

### EXPLOSIVES

March 20, 1944.—044-105.

#### LICENSING AGENCIES

**QUESTION:** Is a Florida State Agency, any political subdivision of the State, or any municipality in the State, required to secure a Florida State Explosive license under Chapter 552, Florida Statutes, 1941, in order to possess and use explosives?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Pertinent sections of the Florida Explosives Law as they bear on the subject of your inquiry provide the following:

Section 552.02 provides that no person shall manufacture, possess or deal in explosives unless he has obtained a license therefor pursuant to the provisions of Section 552.03.

Section 552.01 defines "persons" as including any natural person, partnership, association or corporation.

Section 552.10 (immediately succeeds 552.09 and was evidently intended for 552.10) provides that the provisions of this Act shall not apply to the Armed Forces of the United States, the National Guard, the Florida Defense Force or to officers or employees of the United States, or this state, or any political subdivision thereof, or any municipality of this state authorized by the United States, or the State, or such subdivision, or municipality to handle explosives.

A reading of these three cited sections of the statutes evidences that under this chapter no license is required of the State, any political subdivision thereof, or any municipality, and that the officers or employees thereof may handle explosives under such authority without the requirement of procuring a license.

January 8, 1944.—044-10.

#### STATE FIRE MARSHAL

**QUESTION:** What is the proper construction of the word "possess" as used in Section 552.02, Florida Statutes, 1941, and does it apply to foremen or other employees of an individual, firm or corporation applying for a possessor's license?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Section 552.02, Florida Statutes, 1941, provides that no person shall manufacture, possess or deal in explosives unless he has obtained a license therefor pursuant to the provisions of Section 552.03, Florida Statutes, 1941. Paragraph (3) of Section 552.03, *supra*, relating to applications for license to possess explosives contains the following language:

"The licensing authority shall issue the license applied for unless he finds that either the applicant, or the officers, agents or em-

ployees of the applicant, is not sufficiently experienced in the handling of explosives, lacks suitable facilities therefor, has been convicted of a crime involving moral turpitude, or is disloyal to the United States."

From the quoted language it appears that it is not necessary for the individual agents or employees of one licensed to possess explosives to likewise hold a possessor's license, even though they are employed to handle and have in their possession the explosives being used for the licensee.

It is therefore my opinion that the word "possess" is used in Section 552.02, supra, in its ordinary meaning and not in any unusual or technical manner, that is, as used in said section it means to have and hold as property custodian or owner in one's own right and responsible in such capacity for the safety and security of such property.



## CHAPTER XXVI

### LIQUORS AND BEVERAGES

#### BEVERAGE LAW; ADMINISTRATION

September 10, 1943.—043-237.

##### LICENSE TAX; DETERMINATION—PALM BEACH COUNTY

**QUESTION:** In issuing 1943-44 beverage licenses, under the provisions of Section 561.34, Florida Statutes, 1941, should the Tax Collector of Palm Beach County, in determining the amount of such tax, be governed by the 1940 federal census or by the result of the special census for Palm Beach and Broward Counties, provided for by Chapter 22205, Laws of Florida, Acts of 1943?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

I wish to advise that I have examined Section 561.34, Florida Statutes, 1941, and I find that the license tax is graduated on the basis of population, i.e., the larger the county the greater the tax and the population is to be determined "according to the latest state or federal census." The only possible theory behind such graduated taxes would be that the larger the population of the county the more business a beverage vendor could do and therefore should pay a larger tax.

Chapter 22205 was passed in order that it could be determined whether or not Palm Beach and Broward Counties, which constitute the Fifteenth Judicial Circuit, had a sufficient population to warrant the passage of an act providing for an additional Circuit Judge. This was necessary because the constitutional provision, Article VI, Section 45, with regard to the number of Circuit Judges provides:

"... the total number of circuit judges apportioned to any one circuit shall not exceed one judge for each 50,000 inhabitants or major fraction thereof after this amendment shall have been put into effect ..."

Of course the only manner in which the number of inhabitants of the circuit could be determined was by the taking of a census. The first paragraph of this same section; with reference to the number of judicial circuits, provides that:

"... no judicial circuit as defined by law herein shall embrace less than 50,000 inhabitants according to the last preceding state or federal census ..."

I, therefore, am of the opinion that the manner of determining the number of inhabitants in a judicial circuit in order to apportion one Circuit Judge to every 50,000 inhabitants or major fraction thereof would be according to the latest preceding state or federal census.

Chapter 22205, Laws of Florida, Acts of 1943, makes provision for the taking of a state census to determine the number of inhabitants in the Fifteenth Judicial Circuit. The title of the Act reads: "An Act Providing for Taking a State Census of the County of Palm Beach and County of Broward. . . ." The Legislature therefore apparently determined that this was a state census, otherwise it would not have so styled this Act.

After it had been determined that a lawful act could be passed providing for the appointment of a Circuit Judge under the above quoted

provisions of our Constitution, Chapter 21637, Laws of Florida, Acts of 1943, provided for same. The pertinent part of this Act reads: "The number of judges of the fifteenth circuit of Florida shall be one for each 50,000 inhabitants or major fraction thereof, as may be determined pursuant to law." Thereafter the Governor appointed an additional Circuit Judge under the provisions of Chapter 21637 above referred to for the Fifteenth Judicial Circuit and this Judge has been serving since his appointment and no one has questioned his authority so to do. The construction therefore that everyone has placed upon Chapter 22205 is that it was an act which provided for the taking of a state census and became the latest state census for Palm Beach County.

I therefore cannot see why it should be taken as the latest state census for the purpose of appointing a Circuit Judge and yet should not be taken as the latest state census for the purpose of determining the proper beverage license tax for Palm Beach County; particularly in view of the fact that the reason for graduating the license tax upon the basis of population was for the reason that I have assigned above.

I therefore am of the opinion that "the latest state census" for the purpose of determining the license tax to be charged by the Tax Collector of Palm Beach County under Section 561.34 is that taken under the provisions of Chapter 22205, Laws of Florida, Acts of 1943.

May 10, 1944.—044-137.

#### MANUFACTURE OF FRUIT SPIRITS IN DRY COUNTIES

**QUESTION:** May a producer of livestock feed from citrus fruit pulp and peel, where operating under a federal license in a dry county in this state, also manufacture, as a by-product of his business, fruit spirits suitable for use in the manufacture of cordials, without violating the Beverage Laws of this state?

*To Honorable B. G. Langston, Acting County Attorney, Polk County, Lakeland, Florida:*

Under the stated plan of operation these spirits will be produced from citrus fruit pulp and peel, as a by-product. The pulp and peel are ground during the manufacture of livestock feed, and the resulting liquid, which is known as "press water" is taken, concentrated, and allowed to ferment. After fermentation, it is distilled by ordinary distillation processes, the distillate being fruit spirits of 189 proof.

The operation of the plant will be under a federal alcohol administration basic permit for a fruit distillery, and all fruit spirits produced will be immediately shipped in barrels to all parts of the United States, excepting dry areas, to be used in the manufacture of cordials.

A license may be obtained under the Beverage Law to manufacture wines and cordials in a county where the sale of intoxicating liquors, wines and beers is prohibited. See Sections 561.35 and 561.43, Florida Statutes, 1941. In view of the fact that the company, upon obtaining such license under the provisions of the Beverage Law, could lawfully engage in the business of manufacturing cordials in Polk County, it is my opinion that, under such license, the company could lawfully engage in the production of fruit spirits upon establishing to the satisfaction of the Beverage Department that the product being manufactured is in fact a cordial within the concept of law for this product.

In this opinion I am not undertaking to pass upon anything else except the right to manufacture the product referred to in a dry county, and I think that the question is answered by determining whether or not such product comes within the concept of law for a cordial. It would seem that the Beverage Department itself is best qualified to determine

whether or not this product does in fact come within the legal and factual concept of what constitutes a cordial. I refer you to several definitions of the term. Mida's Directory contains definitions of the beverage. "Types and Terms" gives this definition of cordial: "A term used in the United States as a synonym for liquor, but in England mostly used for compounded beverages, while liquor is reserved for distilled beverages of the same type." The same book defines liquor as follows: "Alcoholic beverage flavored with various aromatics and usually sweetened. Prepared by steeping the flavoring material in the type of alcohol base chosen, and then distilling. Liquors are also compounded by adding flavoring extract and syrup to alcohol bases."

In *U. S. v. 300 Casks of Juniper Cordial*, 28 Fed Cas. 141, the term liquor is said to correspond with the English word cordial and definable to be a liquor composed of alcohol, water, sugar and different aromatic substances.

If these definitions are of any help to the Beverage Department in passing upon the factual question involved, we submit them for such value as they may contain.

September 26, 1944.—044-287.

#### MUNICIPALITIES—POWER TO LEVY TAX

**QUESTION:** Does an incorporated city or town in the State of Florida have authority to levy a license tax in excess of the amount prescribed by the Beverage Law?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

Section 561.36, Florida Statutes, 1941, authorizes each incorporated city or town in the State to levy a license tax in certain circumstances "... not to exceed fifty per cent of the state and county license tax ..." required under the Beverage Law and provides that "No tax ... shall be imposed by way of license, ... by any municipality, any thing in any municipal charter, special or general law to the contrary notwithstanding, except as herein expressly authorized." Before being included in such statutes this section was "Section 12, Chapter 18015, General Laws of Florida, 1937, which became effective on June 5, 1937.

The Florida Statutes, 1941 were enacted by Chapter 20719, General Laws of Florida, 1941 and re-enacted by Chapter 22000, General Laws of Florida, 1943, as the Statutory Law of the State, each of such chapters specifying that it repeals "No special or local statute" or "Any statute for or concerning only a certain municipal corporation."

In view of the foregoing, it is my belief that no determination can be made regarding those cities and towns incorporated by special statutes subsequent to June 5, 1937, or those cities or towns incorporated by special statutes prior to that date whose charters have been amended since such date, without examining and considering the special statutes relating to each of such municipalities.

I am of the opinion, however, that those cities or towns incorporated under the General Laws of the State, and those cities or towns incorporated by special statutes prior to June 5, 1937, whose charters have not been altered since that date, are not empowered to levy a license tax in excess of the percentage fixed in the aforesaid Section 561.36.

September 26, 1944.—044-288.

#### TERRITORY WHERE SALE IS PERMISSIBLE

**QUESTION:** If a county as a whole voted in a local option election to permit the sale of intoxicating liquors, can such liquors be sold in such county in an election precinct where the sale was prohibited on December 31, 1918?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

Founded upon a consideration of Article XIX of the Constitution of the State of Florida as it read and was in effect on December 31, 1918, as well as Sections 2 and 3 of the present Article XIX of such Constitution, I am of the opinion that your inquiry should be answered in the affirmative. In other words, when a county as a whole votes in favor of the sale of intoxicating liquors, such liquors can be sold in every election precinct in the county. When a county as a whole votes to prohibit the sale of intoxicating liquors, such prohibition extends throughout the county.

### BEVERAGE LAW; ENFORCEMENT

July 27, 1943.—043-177.

#### ALCOHOLIC BEVERAGES—HOURS OF SALE

QUESTION: Do the provisions of Chapter 21944, Acts of 1943, apply to wines and beer?

*To Honorable T. W. Conely, Jr., County Judge, Okeechobee, Florida:*

Chapter 21944, Acts of 1943, regulates the hours of sale of "alcoholic beverages" and "intoxicating beverages" but neither term is defined by the provisions of this Act. The terms "alcoholic beverages" and "intoxicating beverages" are both defined by Section 1, Chapter 21839, Acts of 1943, amending Section 561.01, Florida Statutes, 1941, a provision of The Beverage Law, as follows:

"The term 'alcoholic beverage' shall include all beverages containing more than one per cent of alcohol by weight.

"The term 'intoxicating beverage' and the term 'intoxicating liquor' shall include only those liquors, wines and beers containing more than three and two-tenths per cent of alcohol by weight."

In view of the fact that Chapter 21944, *supra*, fails to define either term and that both terms are defined by Section 561.01, *supra*, as amended, it appears that the intent of this Act was to apply to beverages as above defined.

I am, therefore, of the opinion that Chapter 21944, Acts of 1943, is applicable to wines and beers to the extent that the alcoholic content of such wines and beers is sufficient to bring them within the respective definitions of "alcoholic beverages" and "intoxicating beverages" as defined by Section 561.01, Florida Statutes, 1941, as amended by Section 1, Chapter 21839, Acts of 1943. In other words, the term "alcoholic beverages" used in Chapter 21944, *supra*, includes beers and wines containing more than one per cent of alcohol by weight, and the term "intoxicating beverage" used therein, includes beers and wines containing more than three and two-tenths per cent of alcohol by weight.

November 18, 1943.—043-309.

#### BEVERAGE CONTAINING MORE THAN ONE PER CENT ALCOHOL—POSSESSION

QUESTION: May a holder of a license issued under Section 5, Chapter 16774, Laws of Florida, Acts of 1935, legally possess at or in his place of business any beverage containing more than one per cent of alcohol by weight if his license does not permit him to sell such beverage?



*To Honorable E. W. Scarborough, Director, State Beverage Department:*

It is to be noted that Section 5 of Chapter 16774 was brought forward as Section 561.34 in Florida Statutes, 1941.

I call your attention to the provision of Section 562.02, Florida Statutes, 1941, wherein it is provided:

"It is unlawful for a licensee under the beverage law to have in his possession at or in his place of business beverages containing more than one per cent of alcohol by weight and not permitted to be sold by such licensee under the license issued to him under § 561.34."

In my opinion your question must be answered in the negative.

April 8, 1943.—043-94.

#### INTOXICATING LIQUORS—FORFEITURE; DESTRUCTION

**QUESTION:** Could a Judge of the Court of Record in a dry county, where such Court is held, return to a defendant liquor on which the tax has been paid, and which was seized on a search warrant issued by the County Judge of said county where said defendant had been found guilty by the Court or had pled guilty of such violation?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

It appears that the seizure of the liquor referred to occurred in a dry county because it was in dry territory, as it also appears that the tax upon the liquor had been paid.

It further appears that the defendant had been convicted either upon trial or upon a plea of guilty.

This situation seems to be ruled by the second part of Section 568.10, Florida Statutes, 1941, which reads as follows:

"... Upon the conviction of the person arrested for the violation of any provisions of this chapter, the judge of the court trying the case, after such notice to the person convicted, and any other person whom the judge may be of the opinion is entitled to such notice, as the judge may deem reasonable, shall issue to the sheriff of the county a written order adjudging and declaring such intoxicating liquors, wines or beer forfeited, and directed such sheriff to destroy such liquors, wines or beers. Such destruction shall be in the presence of the clerk of the circuit court of said county and at such times, places and in such manner as such judge shall, in his order, direct."

From the quoted section, it would appear that in the circumstances the County Judge should not return the liquor in question to the defendant but should pursue the terms of the above quoted section of the statute.

August 23, 1943.—043-212.

#### INTOXICATING LIQUORS—FORFEITURE; SALE

**QUESTION:** May intoxicating liquors be forfeited and sold in accordance with the provisions of Chapter 22024, Laws of Florida, Acts of 1943, even though such liquors were lawfully seized prior to the passage of said act?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

Prior to the enactment of Chapter 22024, supra, Section 568.10 Florida Statutes, 1941, provided for the seizure of all intoxicating liquors found in the possession of one charged with violating the provisions of the Beverage Law of Florida, and that, upon conviction of such person for any such

offense, the Judge of the Trial Court should enter an order forfeiting such liquors and directing the Sheriff to destroy the same. Chapter 22024, supra, amended Section 568.10, supra, and provided that such order of forfeiture shall direct the Sheriff:

"... to sell such liquors, wines or beer to any licensed wholesaler in the State of Florida, upon the condition that new State of Florida stamps be placed thereon, or in case of beer and wine, that the tax levied by the beverage law of Florida be again paid thereon, and that the money received from said sale, be paid into the General Fund, or such like fund, of the county in which such seizure was made, such sale shall be made, however, only upon submission by said sheriff of a request for bids to at least five wholesalers in the State, and such sale shall be made to the highest and best bidder; such order shall further provide, in the event any such forfeited liquors, wines and beer cannot be so sold, that the sheriff shall immediately destroy the same, or deliver the same to the Beverage Director of the State of Florida for disposition as provided by Section 562.44. In the event said liquors, wines and beer are to be destroyed under such order such destruction shall be in the presence of the clerk of the circuit court of said county and at such times, places and in such manner as such judge, in his order, direct."

Section 568.10, supra, as amended by Chapter 22024, supra, does not levy an increased burden upon the defendant or in any manner affect any of his rights. Any right or title that he might have had to the intoxicating liquors seized ceased to exist upon the entry of a lawful order of forfeiture. Whether the State of Florida sells or destroys intoxicating liquors that have been lawfully forfeited to it is a matter of procedure concerning which a defendant may not be heard to complain.

It is, therefore, my opinion that your question should be answered in the affirmative.

August 10, 1943.—043-196.

#### INTOXICATING LIQUORS—HOURS OF SALE

**QUESTION:** Under the provisions of Chapter 21944, Laws of Florida, Acts of 1943, is it unlawful for a place of business to sell intoxicating liquors between the hours of 12 o'clock midnight Saturday and 7 o'clock A. M. Monday, even though the incorporated city in which such place of business is located has by ordinance permitted the sale of intoxicating liquors? Also, do the provisions of this chapter prohibit the sale of beer and wine between the hours of 12 o'clock midnight Saturday and 7 A. M. Monday?

*To Honorable H. T. Williams, Sheriff, Brevard County, Titusville, Florida:*

This chapter regulates the hours within which alcoholic beverages and intoxicating beverages may be lawfully sold. Under the provisions of Chapter 21839, Laws of Florida, Acts of 1943, the term "alcoholic beverage" includes all beverages containing more than one per cent of alcohol by weight. The term "intoxicating beverage" and the term "intoxicating liquor" includes only those liquors, wines and beers containing more than three and two-tenths per cent of alcohol by weight.

Under the provisions of Chapter 21944, supra, it is unlawful for any person, whether within or outside the limits of a municipality, to sell any beverage containing more than one per cent of alcohol by weight between the hours of midnight and 7 o'clock A. M. of the following day. In territory outside of a municipality, it is unlawful for any person to sell or serve any beverage containing more than three and two-tenths per cent of alcohol by weight between 12 o'clock midnight Saturday and 7 o'clock A. M. Monday.

Those persons engaged in selling in sealed containers intoxicating beverages for consumption off the premises may not lawfully sell the same between the hours of 8 o'clock P. M. and 7 o'clock A. M. of the following day, regardless of the place where such sale may occur, and no such sales may be lawfully made on Sunday anywhere in Florida.

It is my opinion that under the provisions of Chapter 21944 and subject to the limitation above stated with reference to sale of intoxicating liquors (in sealed containers for consumption off the premises), an incorporated city or town may by ordinance permit the sale, service and consumption on Sunday of the intoxicating liquors within its territorial limits between the hours of 7 o'clock A. M. and 12 o'clock P. M., and the sale or service of intoxicating liquors made pursuant to such an ordinance would be lawful.

If a wine or beer contains more than three and two-tenths per cent alcohol by weight, then such wine or beer is an intoxicating beverage and the same may not be sold on Sunday in territory outside of a municipality and may not be sold on Sunday within a municipality unless there has been enacted by such municipality an ordinance permitting such sale and service.

If a wine or beer contains less than three and two-tenths per cent of alcohol by weight, then in my opinion the provisions of Chapter 21944 do not prohibit the sale of such beverage during the hours of 7 o'clock A. M. and midnight on Sunday.

October 19, 1944.—044-308.

#### MARRIED PERSON UNDER TWENTY-ONE YEARS OF AGE

QUESTION: 1. Is it unlawful by reason of Section 562.11, Florida Statutes, 1941, for a licensee, pursuant to the Beverage Law, to sell, give, serve or permit to be served intoxicating liquors to a person under twenty-one years of age whose disabilities of nonage have been removed by marriage?

2. Is it unlawful by reason of Section 562.13 of the aforesaid statutes for a person under twenty-one years of age, whose disabilities of nonage have been removed by marriage, to be employed in a place where intoxicating liquors are sold?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

Chapter 743, Florida Statutes, 1941, seems to have been designed to effect the removal by marriage of the civil disabilities imposed by reason of minority, conferring upon married minors civil powers, and subjecting them to civil liabilities, which they did not have and to which they were not subject before marriage. Such a change in status cannot be said to alter Section 562.11, which reads as follows:

"It is unlawful for any licensee to sell, give, serve or permit to be served intoxicating liquors, wines or beers to persons under twenty-one years of age."

The restrictions of this section clearly are imposed upon the "licensee" and not "persons under twenty-one years of age." Moreover, a minor whose disabilities have been removed is still a person under twenty-one years of age.

In view of the foregoing, it is my opinion that your first question should be answered in the affirmative.

Section 562.13, referred to in the second question, provides that:

"It is unlawful for any vendor (licensed under certain designated subsections of the beverage law) to employ any person under twenty-one years of age, whose disabilities of nonage have not been removed, to work in the place of business of such vendor."

Section 450.23 of the aforesaid statutes, relating to the employment of persons under twenty-one years of age and being a part of the chapter on child labor, was amended by Section 12 of Chapter 21996, Laws of Florida, 1943, to read as follows:

"No person under twenty-one years of age, whether such person's disabilities of nonage have been removed by marriage or otherwise, shall be employed, permitted or suffered to work in, about, or in connection with, any pool room, billiard room, brewery, saloon, barroom, or any place where intoxicating liquors are manufactured or sold; provided, however, this Section shall not apply to professional entertainers between the ages of eighteen and twenty-one years who are not in school or to Drug Stores or Grocery Stores which have obtained a license to sell beer and wine, and where such sales are made for consumption off the premises only; and provided further, this Section shall not prohibit the employment of bell-boys, elevators boys and others under the age of twenty-one years in hotels where such employees are engaged in work apart from the portion of the hotel property where alcoholic beverages are offered for sale for consumption on the premises."

I am of the belief that the section just quoted is the controlling law in regard to the second question, which is likewise answered affirmatively.

#### LOCAL OPTION ELECTIONS

April 26, 1943.—043-104.

##### SALE THROUGH PACKAGE STORES—CONSTITUTIONALITY

**QUESTION:** Is an act constitutional which provides for an election to determine whether the sale of intoxicating beverages shall be limited to sale by package and sealed containers only?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

The language of Article XIX of the Constitution of Florida, Section 1, is, in the applicable portion under consideration, as follows:

"... shall call and provide for an election in the County in which application is made, **to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein.**" (Emphasis supplied).

There is nothing in this section of the Constitution which would justify the assumption that the election provided for was other than a comprehensive "wet or dry" election.

I do not find any decision that would throw any light on this matter one way or another.

It is therefore my opinion that the election called under Article XIX must be one based upon the question set forth in Section 1 of Article XIX above quoted.

Of course, after the election is held and results in a wet vote, the method of selling could be limited and controlled by legislation.

The provision of Section 2, Article XIX to which you refer does not apparently go beyond the provision for an election on the question contained in Section 1 as aforesaid.

In Section 3 of Article XIX this view is strengthened by the following language of the last sentence thereof which is:

"... said election to be otherwise as provided in Article 1 hereof."

I trust that this will give you the desired information.



## CHAPTER XXVII

### AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

#### STATE LIVESTOCK SANITARY BOARD

August 25, 1943.—043-218.

##### CLAIM FOR SERVICES—TICK INFESTED DEER

QUESTION: Has the State Livestock Sanitary Board authority to approve the following claim:

Services for 300 days (June 1933-October 1937)

Wages of employees

Use of horses

Cost of ammunition

All above services and expense incurred in exterminating tick infested deer in territory adjacent to Norton Ranch in Polk County, Florida .....\$500.00?

To Dr. J. V. Knapp, Secretary, State Livestock Sanitary Board:

In the case of Hancock vs. Karel, 173 So. 274, the Supreme Court of Florida held that the statutes relating to the powers of the State Livestock Sanitary Board, said statutes being Sections 3320 and 3322, C. G. L., 1927 (Sections 585.08 and 585.14, Florida Statutes, 1941), did not vest in said Board direct or implied authority "to have wild deer removed by shooting and killing from prescribed areas where cattle tick eradication is being officially engaged in by the board, . . ."

It does not appear from the claim referred to that the Board authorized the performance of the services for which compensation is now sought. However, under the decision above referred to, the Board could not have lawfully authorized the performance of such services, and it follows that the Board is without authority to approve the claim for payment.

April 22, 1943.—043-107.

##### HOG CHOLERA SERUM AND VIRUS—APPROPRIATION; EFFECTIVE DATE

QUESTION: What is the effective date of the amendment to the continuing appropriation contained in Senate Bill No. 1, passed by the Florida Legislature for the year 1943? Is the distribution of virus and serum authorized therein to be limited by Section 585.43, Florida Statutes, 1941 (Chapter 20733, Laws of Florida, 1941)?

To Dr. J. V. Knapp, State Veterinarian:

Senate Bill No. 1 is an amendment to Section 585.32, Florida Statutes, 1941, superseding Chapter 20357, Laws of Florida, Acts of 1941. Section 3 of such Senate Bill No. 1 provides:

"This Act shall take effect immediately on its passage and approval by the Governor, or upon its becoming a law without such approval."

Section 215.01, Florida Statutes, 1941, provides that the fiscal year of the State shall begin July 1 and end June 30.

Section 1 (3) of Senate Bill No. 1 provides for an annual appropriation of \$175,000.00, which increases the previous annual appropriation by \$25,000.00.

It is my opinion that on becoming a law, if prior to July 1, 1943, Senate Bill No. 1 will increase the appropriation for the fiscal year July 1, 1942, to June 30, 1943, by \$25,000.00 and that thereafter from \$175,000.00 annually.

It is also my opinion that free distribution of serum and virus under Senate Bill No. 1 is limited to bona fide farmers and that commercial garbage feeders of hogs, and others making application therefor, who are not entitled to free distribution by virtue of Chapter 20733, Laws of Florida, 1941, are entitled to distribution at a price equal to the cost therefor. The term "commercial garbage feeder" is a separate classification and does not apply where the applicant is a bona fide farmer.

April 12, 1944.—044-128.

May 17, 1944.—044-152.

#### HOG CHOLERA SERUM AND VIRUS—AUTHORITY OF STATE BOARD

**QUESTION:** Does the State Livestock Sanitary Board have authority to order and use hog cholera serum and virus, at this time, and pay for it after July 1, 1944, out of the appropriation which becomes available on and after said date?

*To Honorable J. M. Lee, State Comptroller:  
To the State Livestock Sanitary Board:*

It appears that if the inoculation of hogs with hog cholera serum ceases until the next fiscal year a tremendous loss will be suffered by the hog-raising industry of Florida. It further appears that any serum purchased and used at this time will continue to be effective in the hogs inoculated until long after July 1, 1944.

In view of the foregoing facts, and information that has come to me from other sources, I am of the opinion that the State Livestock Sanitary Board has authority to order and use hog cholera serum and virus at this time, and pay for it after July 1, 1944, out of the appropriation which, under my previous opinion, becomes available July 1, 1944.

January 7, 1943.—043-7.

#### HOG CHOLERA SERUM AND VIRUS—DISTRIBUTION; PURCHASE

**QUESTION:** Is a farmer who produces some hogs and some feed on his farm, and, in addition, purchases feeder pigs on the market and also buys some corn and wheat and other grain with which to fatten them, entitled to free hog cholera serum, or should he be required to pay cost price?

*To Dr. J. V. Knapp, State Veterinarian:*

It is my opinion that such a farmer and swine owner is entitled to the hog cholera serum without cost, provided, of course, he is a bona fide farmer.

My reason for such opinion is based on Chapter 20357, General Laws of Florida, 1941, Section 2, which provides as follows:

"The State Livestock Sanitary Board shall distribute through employees of said Board, licensed Veterinarians and recognized and approved agents of the State and Federal Government, anti-hog

cholera serum and hog cholera virus without cost thereof to any owner of swine in Florida making application therefor, upon blanks to be furnished by the said Board and approved by the administrator of said anti-hog cholera serum and hog cholera virus."

You will note that the above section in part provides hog cholera serum and hog cholera virus without cost thereof to any owner of swine in Florida making application therefor.

Chapter 20733, General Laws of Florida, 1941, Section 1, provides:

"From and after the passage of this Act the free distribution of anti-hog cholera serum and hog cholera virus by the State Livestock Sanitary Board of Florida, under existing laws or under any laws enacted at the 1941 Session of the Florida Legislature, shall be limited to bona fide farmers."

In the above section, the words "bona fide farmers" are used; therefore, it appears to me that for one to be entitled to the free serum he must be a bona fide farmer, and the fact that he raises only a portion of the feed with which to feed the swine is not the test, for the controlling factor is that he must be a bona fide farmer. While you do not specifically request my opinion as to the classification you have given commercial garbage feeders of hogs, it is my judgment that the interpretation you have placed on Chapter 20733, General Laws of Florida, 1941, is correct.

July 14, 1943.—043-165.

#### HOG CHOLERA SERUM AND VIRUS—VACCINATION OF HOGS

QUESTION: 1. Is the State Livestock Sanitary Board authorized to direct the veterinarians employed by the Board to charge a service fee of twenty cents per head for vaccinating hogs?

2. If so, is the Board authorized to use the funds derived from such fees for the purchase and distribution of additional free hog cholera serum and hog cholera virus to the hog producers of this state?

To Dr. J. V. Knapp, State Veterinarian:

1. I find no provision of law either authorizing, permitting or prohibiting the State Livestock Sanitary Board's charging a service fee for the vaccination of hogs by state employed veterinarians. In fact, the law is silent on this subject. There is no express provision of law authorizing the State Livestock Sanitary Board to employ veterinarians or prescribing the powers and duties of the Board relative thereto, or the powers, duties and functions to be performed by such veterinarians. It is a matter of common knowledge that the State Livestock Sanitary Board has for many years in the past employed veterinarians to vaccinate hogs and that no service fee has ever been charged for such services. In view of the fact, that the Legislature, with the knowledge that no service fee for vaccinating hogs has ever been charged, has for many years biennially appropriated money for the purchase and free distribution of hog cholera serum and virus and money to pay the salaries and expenses of state employed veterinarians to vaccinate hogs, without authorizing or directing the State Livestock Sanitary Board to charge such fee, it appears by implication that the Legislature intended that such veterinarians should vaccinate hogs without charging any service fee therefor.

2. In view of my answer to the first question, it becomes unnecessary to answer the second question.

I am, therefore, of the opinion that the State Livestock Sanitary Board is without authority to charge a service fee for the services of state employed veterinarians for vaccinating hogs, unless and until such service fee is subsequently authorized by Act of the Legislature of this State.

October 29, 1944.—044-310.

#### MEAT-PRODUCING ANIMALS—POULTRY.

**QUESTION:** Does Section 585.34, Florida Statutes, 1941, authorizing state supervision of establishments engaged in the slaughter of meat-producing animals, include poultry slaughter establishments?

*To Dr. J. V. Knapp, Secretary, State Livestock Sanitary Board:*

As you are aware, Section 585.34, among other things, allows any person engaged in the slaughter of "meat-producing animals" within the State of Florida to make application to the Board for a permit to transport and sell their products at any place within the limits of the State. In order to determine what are considered to be meat-producing animals, we find that in Section 585.01, which is devoted to definitions, a "domestic animal" is defined to be any equine or bovine animal, goat, sheep, swine, dog, poultry, or any other domesticated beast or bird.

Although the words "meat-producing animals" are used in Section 585.34 instead of "domestic animals," I am of the opinion that poultry, being defined as an animal in Section 585.01, should be construed to be embraced in the term "meat-producing animal," and that your Board should cause to be made a thorough inspection of any plant or business established for the purpose of slaughtering poultry for sale in the State.

#### BOARD OF FORESTRY

August 12, 1943.—043-202.

#### EQUIPMENT—RECOVERY FROM EMPLOYEES

**QUESTION:** May the Florida Board of Forestry and Parks legally establish a procedure whereby its employees may be required to account for and make good the loss of equipment or tools owned by the Florida Forest and Park Service which are entrusted to such employees for use in their work; and for such purpose may deductions be made from their salaries or from amounts allowed for their annual leaves?

*To Honorable H. J. Malsberger, State Forester, Florida Forest and Park Service:*

There is nothing in the statutes precluding the establishment by your Board of a procedure such as you have in mind. However, such procedure must have its basis in the contracts of employment of the Board's employees.

Chapter 21961, Laws of Florida, Acts of 1943, relating to the State Forester, inter alia provides, "said board (Florida Board of Forestry and Parks) shall employ such assistants, agents, clerks and employees on such terms and conditions as said board shall deem advisable."

The relation of the State and its employees is upon practically the same legal basis as that of private employers and their employees.

Your Board can with its present and new employees require as a condition to their continued or initial employment, that they assent to the establishment of the procedure you have in mind as a part of their contracts of employment.

"A provision in a contract of employment that wages be forfeited in whole or in part for a violation of rules is, in the absence of statute, valid and enforceable," 35 American Jurisprudence, 504. See Ann. Cas. 1918D 83, et seq.

To properly implement such procedure, it is suggested that your Board formally adopt and promulgate a resolution or rule providing that each employee of the Board continuing in or thereafter entering its employ,



shall be subject to having the Board reduce his monthly salary or his annual leave allowance to the extent of a sum representing the fair market value of any equipment or tools which on or after a date specified in the rule are entrusted to his care and custody for use in the work of the Florida Forest and Park Service, and which for any reason are unaccounted for by him to the State Forester within five (5) days after demand is made by the State Forester upon him for return of same, excepting, however, from the rule, loss or destruction of any such equipment or tools as a result of actual use in the performance of the work of the Florida Forest and Park Service, which loss or destruction is fully explained and was occasioned without any negligence or bad faith on the part of such employee.

Notice of such rule must be given all employees and receipts for all equipment or tools entrusted to an employee should be signed by such employee, which receipt should recite that the employee assents to such rule as a part of his contract of employment.

It is absolutely necessary that the rule be uniformly and reasonably administered, without undue harshness, so that it will not become an instrument of oppression or discrimination. It should be remembered that the Courts will always be open to settle any disputes that may arise as to the proper application of the rule.

Where a deduction from monthly salary is to be made under the rule, the monthly salary requisition of the employee and the payroll tendered the State Comptroller should merely reflect the reduced salary amount. However, previous due notice of intention to so reduce the salary must be given the employee affected.

November 3, 1943.—043-264.

#### LIABILITY—OVERFLOW OF PRIVATE LANDS

**QUESTION:** It is alleged that dams erected by the Florida Board of Forestry and Parks at upper lake in the Myakka River State Park are backing up the water on pasture lands north of the park. The owners of these lands are threatening suit against the Board. Is the Board immune from such suit, and what measures should be taken to forestall the threatened litigation?

*To Honorable H. J. Malsberger, State Forester, Florida Forest and Park Service:*

Since your Board is a State Agency partaking of the State's immunity from suits, which immunity has not been waived by valid law, it cannot be sued in tort for damages for injuries inflicted upon these lands. See *Arundel Corporation vs. Griffin*, 89 Fla. 128, 103 So. 422. But if these lands have been physically invaded and permanently overflowed by waters backed up by the dams erected by your Board, it amounts in law to an appropriation of private property without due process and without payment of just compensation, which may be remedied, (1) by waiving the trespass or tort and bringing an appropriate common law action or suit in equity to recover compensation for the value of the lands appropriated or the equivalent of what would have been awarded as compensation had the lands been formally condemned; or (2) by injunction or other appropriate equity proceeding against the Board or perhaps its officers and employees individually to remove that portion of the dams which causes the overflow of the lands, or otherwise remedy the conditions existing. See Sections 589.07 and 589.27, Florida Statutes, 1941, which authorize your Board to purchase or condemn property for forestry and park purposes. See third headnote of *Arundel Corporation vs. Griffin*, supra; *Rosenbaum vs. State Road Department of Florida*, 129 Fla. 723, 177 So. 220; *State Road Department of Florida vs. Tharp*, 146 Fla. 745, 1 So. (2d) 868; *State Road Department vs. Bender* 147 Fla. 15, 2 So. (2d) 298; 18 Am. Jr. page 759.

So far as forestalling the threatened litigation is concerned, my suggestions are that you endeavor to remedy the conditions existing to the extent of draining the waters off the private lands by ditches or by lowering the dams, or by paying compensation for the lands permanently overflowed and taken, if in fact private properties have been overflowed because of the erection of the dams. You should ascertain by engineering investigation and surveys whether the water level of the lake has been raised by your dams so as to actually flood the land ownerships of private persons. If it should develop that the waters have not overflowed and damaged these lands or if the damage is inconsequential, then there is no duty upon your Board to remedy the situation.

April 14, 1943.—043-99.

#### GROSS RECEIPTS FROM LANDS

**QUESTION:** 1. Where the Florida Board of Forestry and Parks pays taxes assessed for the payment of school or special tax school district bonds, issued prior to the Board's purchase of the land so taxed, may the Board take credit for the taxes so paid when making payment of the ten per cent of the gross receipts from the lands under Section 589.08, Florida Statutes, 1941?

2. Where the Board pays the said ten per cent of gross receipts, and the lands are later assessed for the payment of school or special tax school district bonds as aforesaid, may the Board take credit for such payment in making future gross receipt payments as aforesaid?

*To the Florida Board of Forestry and Parks:*

Section 589.08, Florida Statutes, 1941, provides that after lands purchased for a state park or forest have been paid for then ten per cent of the gross receipts from said lands shall be paid to the county or counties wherein such lands lie, in proportion to the acreage located in each county, for use by the county or counties for school purposes. These funds are payable to the counties and not to some special school tax district. They become County School Funds and not Special Tax School District Funds.

Special tax school districts are separate and distinct governmental entities from the county wherein they lie (*Hamrick vs. Special Tax School District*, 130 Fla. 453, 178 So. 406). County Funds are not liable for district obligations; neither are District Funds liable for county obligations (*Board of Public Instruction vs. Knight and Wall Company*, 100 Fla. 1649, 132 So. 644). Section 9, Article XII, Florida Constitution, provides for a County School Fund consisting of certain moneys and "all appropriations of the legislature" which funds must be distributed "solely for the support and maintenance of public free schools." The provision in Section 589.08, Florida Statutes, 1941, is in effect an appropriation to the county for school purposes, which may not be used for the payment of district bonded indebtedness (*Leonard vs. Franklin*, 84 Fla. 402, 93 So. 688).

In the light of the authorities and statutes applicable it seems that the two questions posed above must be answered as follows, to wit:

1. Where the Florida Board of Forestry and Parks pays taxes assessed for the payment of school or special school district bonds, issued prior to the Board's purchase of the lands so taxed, the said Board may not take credit for the taxes so paid, when making payment of the ten per cent of the gross receipts from the lands under Section 589.08, Florida Statutes, 1941. This is true because the taxes paid were for a district purpose and the ten per cent of gross receipts is for a county purpose.

2. Where the Board pays the said ten per cent of gross receipts, and the lands are later assessed for the payment of school and special district bonds as aforesaid, the Board may not take credit for such payment in making future payments as aforesaid. This is likewise true because the taxes paid were for a district purpose and the ten per cent of gross receipts is for a county purpose.

August 26, 1944.—044-261.

#### SALE OF LANDS OWNED BY THE BOARD

QUESTION: 1. What is the procedure for the sale of lands owned by the Florida Board of Forestry and Parks?

2. Is it necessary to give public notice of such sales?

3. Where such sales are made, does the law require that oil and mineral rights in the lands sold be reserved?

4. Does a percentage of the proceeds of such sales go to the State School Fund?

*To Honorable H. J. Malsberger, State Forester, Florida Forest and Park Service:*

The outright sale of lands owned by the Florida Board of Forestry and Parks is authorized by Section 589.10, Florida Statutes, 1941. In order to comply with said section the following procedure is recommended: the Board should adopt a resolution describing the property to be sold and reciting the purpose for which it was formerly acquired or used by the Board and that the property is no longer required for such use or purpose, or for any State Forest or State Park purpose. The resolution should also recite that it is advantageous to the State to make the sale and that it is in the interest of the development, improvement and management of the state forests or state parks to do so. The resolution should authorize and direct the members of the Board to execute the deed. The deed must be executed not only by the board members but also by the Trustees of the Internal Improvement Fund and by the Governor, inasmuch as Section 589.10 requires the concurrence of said Trustees and the Governor in sales of land made by the Board.

Section 589.10 requires the Board to give at least thirty (30) days' public notice of such sale. In order to comply with this requirement the notice should contain a description of the land and recite that, on a date specified therein, the Board at its Tallahassee office will sell the land to the highest bidder for cash. The notice should state that the Board reserves the right to reject all bids. The notice should be published at least once thirty days before the date of sale in a newspaper of general circulation in the county in which the land to be sold is situated.

The law does not require the Board to reserve oil and mineral rights in lands sold by it, but there is nothing in the law prohibiting the Board from reserving such rights if it deems it advisable.

Section 589.09, Florida Statutes, 1941, requires that twenty-five (25) per cent of the net proceeds from the sale of land by the Board shall be paid into the State School Fund. In paying such funds to the State school Fund the Board should present a statement of the transaction to the Comptroller and secure from him a certificate showing the proper account to which the funds shall go, and then turn the certificate with the funds over to the State Treasurer. In so doing the Board will satisfy the requirements of Section 215.02, Florida Statutes, 1941, governing payments to the State generally.

June 4, 1943.—043-129.

### STATE AID IN FIRE CONTROL

**QUESTION:** May the Florida Board of Forestry and Parks adopt a policy, with relation to county fire control units, whereby the state aid to one such control unit may be a greater percentage of the total cost than in other control units?

For example, may the Board pay half of the total costs in fire control in one unit and a third of the total costs in another? The reason for making a difference in the amount of the aid by the State seems to be that some counties of low assessed valuation have a greater acreage in forests than do other counties of a higher assessed valuation.

*To the Florida Board of Forestry and Parks:*

The purpose of fire control in any county, or in the State as a whole, is to preserve and replenish the timber industry in the State; to insure timber for building and other industries within the State; and for other purposes. The timber and turpentine industries in this state have been a large factor in its development; and most recently have been the basis of bringing a large paper industry into the State. It, therefore, appears that the State as a whole has as great an interest in the timber industry as do the counties, or other localities, where the forests are situated. The loss of a timber industry in any county will tend to affect the State as a whole.

Under Sections 125.23 to 125.30, Florida Statutes, 1941, counties are permitted to establish county fire control units and are authorized to enter into agreements with the Florida Board of Forestry and Parks concerning the establishment and maintenance of such units (Section 125.25, Florida Statutes, 1941); and the said Board of Forestry "may cooperate with said counties in the establishment and maintenance of such county fire control units and supplement the funds appropriated (by said counties) . . . with funds accruing to said state board of forestry" (Section 125.27, Florida Statutes, 1941). I find nothing in this law, or any other law relating to the powers and duties of the State Board of Forestry and Parks, which fixes the amount or percentage of aid or assistance which may be given by the Board to any county fire control unit. Under Chapter 590, Florida Statutes, 1941, the Board may establish forest protection districts and take steps to prevent, detect and suppress forest fires within said protection district.

In my opinion the use of state money for forest protection is for a state purpose (see 11 Am. Jur. 1034 section 276; 34 Am. Jur. 526, section 53). The rendering of assistance to a county or cooperating with a county in protecting its forests would seem to be both a state and a county purpose. Money expended by the State for that purpose would not be money for other than a state purpose. It seems clear that a state might take over the protection of all or any part of the forest lands within its borders. Therefore, there appears no reason why it cannot render assistance to a county, in its forest protection, without such assistance becoming a county purpose. If there be areas where counties cannot properly protect their natural resources without state aid, when such resources are also state resources, I see no reason why the State cannot render such aid, although it may not render such aid to other counties or may render less aid to other counties.

I am, therefore, of the opinion that the Florida Board of Forestry and Parks may adopt a policy, with relation to county fire control units, whereby the State aid to one such unit may be a greater percentage of the total cost than in other control units.



## MARKETING BUREAU AND BOARD

April 5, 1944.—044-125.

## MILEAGE TO FEDERAL-STATE EMPLOYEES

QUESTION: Does Section 112.06, Florida Statutes, 1941, as amended by Chapter 21913, Laws of Florida, 1943, limit Federal-State Inspectors, paid from Federal Funds and funds derived from Section 603.12, Florida Statutes, 1941, to five cents a mile when using a privately owned automobile?

*To Honorable L. M. Rhodes, Commissioner, State Marketing Bureau,  
Jacksonville, Florida:*

Section 603.12, Florida Statutes, 1941, provides for inspection of fruits and vegetables and the payment of an inspection fee by the shipper.

Section 603.13, Florida Statutes, 1941, provides for the payment of such fees to the State Marketing Commissioner, who

"shall deposit same in a fund to be known as the Cooperative Inspection Fund and all expenses for inspection service shall be paid from said fund upon the approval and at the direction of the State Marketing Commissioner . . ."

You advise me that a joint cooperative agreement has been executed between the United States Department of Agriculture and the Florida State Marketing Bureau for inspection, pursuant to Federal Law and Section 603.12, Florida Statutes, 1941; that the United States and the Florida State Marketing Bureau contribute to a fund known as the Cooperative Inspection Fund, the State's part arising pursuant to Section 603.13, Florida Statutes, 1941; that the inspectors operating under such plan are licensed by the Federal Government and are paid from the Cooperative Inspection Fund, no state voucher being tendered for such Federal-State employees.

Section 112.06, Florida Statutes, 1941, as amended by Chapter 21913, Laws of Florida, 1943, providing for limitation of mileage, refers to State employees. The classification of Federal-State employees is not mentioned in such statutes. Such Federal-State employees are not covered by the mileage limitation contained in the statute last above mentioned, but are limited only by that part of Section 603.13, which provides:

"All expenses for inspection service shall be paid from the fund upon the approval and at the direction of the Marketing Commissioner."

It is evident that the expenses of Federal-State employees are to be paid from the Cooperative Inspection Fund at the direction of the State Marketing Commissioner.

It is therefore my opinion that a Federal-State employee making inspections pursuant to Section 603.12, Florida Statutes, 1941, is not such a State employee, within the purview of Chapter 21913, Laws of Florida, 1943, as to be bound by and limited to five cents per mile in using a privately owned car.

You will notice that this opinion is limited strictly to Federal-State employees.

## CHAPTER XXVIII

### CORPORATIONS AND BUSINESS TRUSTS

#### COMMON LAW DECLARATIONS OF TRUST

August 11, 1944.—044-239.

##### POWER OF APPOINTMENT—INTANGIBLE TAXES

**QUESTION:** Under a trust agreement between "A" and "B" and a certain Trust Company of Connecticut, "C" is the beneficiary of a Trust Fund created by said trust agreement, with power to appoint, by her last will, the persons who shall take the principal of said trust after her death.

On October 12, 1942, the said "C" signed a paper, wherein she stated that she irrevocably released all power of appointment granted her by said trust agreement.

In the light of the above mentioned facts, is the power of appointment subject to taxation, under our Intangible Tax Law?

*To Honorable J. M. Lee, State Comptroller:*

Under a trust agreement between "A" and "B," parties of the first part, and a certain Trust Company of Connecticut, party of the second part, "C" is the beneficiary of a Trust Fund created by said trust agreement, with power to appoint, by her last will, the persons who shall take the principal of said trust after her death.

On October 12, 1942, the said "C" signed a paper, wherein she stated that she irrevocably released all power of appointment granted her under said trust agreement.

In the light of the above mentioned paper, is this power of appointment subject to taxation, under our Intangible Tax Law?

I have examined the documents, which comprehend a photostat copy of a trust agreement between "A" and "B" and the Trust Company, and a certain release of power of appointment signed by "C."

It is my opinion that the attached release does not constitute a conveyance out of "C" to any other person, nor is it based upon a sufficient consideration to prevent revocation by her of the release at any time she might desire.

For this reason it is my opinion that the power of appointment constitutes an equitable estate in the corpus of the trust such as is described in the now familiar Ford case, and that the same is subject to intangible taxation upon the value of the power.

#### GENERAL PROVISIONS

April 22, 1944.—044-131.

##### CAPITAL STOCK TAX

**QUESTION:** May a corporation, organized as a corporation for profit under the statutes of this state, be converted into a corporation not for profit, merely by being labeled as such by its officers, so as to exempt such corporation from making the annual reports and paying the corporation stock taxes required by Section 610.07 and 610.08, Florida Statutes, 1941?

*To Honorable R. A. Gray, Secretary of State:*

The corporation in question was organized under Chapter 10096, Laws of Florida, Acts of 1925, now Chapter 612, Florida Statutes, 1941, and, thereafter, for the years 1935 to 1940, inclusive, it filed its annual report and paid the franchise tax upon its capital stock, as required by Sections 610.07 and 610.08, Florida Statutes, 1941.

The preamble of the certificate of incorporation filed in the office of the Secretary of State, sets forth that the corporation was organized pursuant to the terms and provisions of the said 1925 General Corporation for Profit Act.

The said corporation has submitted a statement claiming that it is a corporation not for profit and represents that it is not liable for the payment of the tax as required by Section 610.08, *supra*.

It is my opinion that the character or type of a corporation is to be determined by the Corporation Law under which the same was organized and also by reference to the provisions contained in the certificate of incorporation. A corporation for profit cannot be changed into a corporation not for profit merely by its being labeled such by its officers.

The corporation to which you refer is in my opinion a corporation for profit and as such, is required to conform with the provisions of Sections 610.07 and 610.08, Florida Statutes, 1941.

February 3, 1943.—043-38.

#### CAPITAL STOCK TAX—LIABILITY

**QUESTION:** Is the issuance of stock and the holding of a meeting of stockholders and directors for the purpose of increasing the authorized capital stock of the corporation an exercise of the corporate franchise subjecting the corporation to the tax provided for in Chapter 14677, Acts of 1931, as amended (Chapter 610, Florida Statutes, 1941)?

*To Honorable R. A. Gray, Secretary of State:*

There seems to have been no decision by our own courts on the point, but examination of authorities in other jurisdictions, although meager, leads me to the conclusion, and you are now advised that it is my opinion, that the acts of the corporation cited by you are purely matters of arrangement or rearrangement of the internal affairs of the corporation, and do not constitute the exercise of the corporate franchise or the transaction of business such as to subject the corporation to tax liability.

April 26, 1944.—044-140.

#### CAPITAL STOCK TAXES—REFUND

**QUESTION:** Where a corporation operating within this state an industrial plant within the purview of Section 12, Article IX, Florida Constitution, pays the corporation capital stock franchise taxes required by Section 610.08, Florida Statutes, 1941, is it entitled to a refund of such taxes upon the theory that no such taxes were payable under the constitutional provision above mentioned?

*To Honorable J. M. Lee, State Comptroller:*

I have examined the petition and exhibits of the corporation for such refund, the case of American Can Company vs. City of Tampa, et al., 14 So. 2d 203, Sections 610.07-610.15, Florida Statutes, 1941, requiring the filing of annual reports and the payment of the tax in question, and Section 12, Article IX, Florida Constitution, which was construed in the case mentioned above.

In the case of the American Can Company vs. City of Tampa, et al., it will be noted that the opinion upon the petition for rehearing which purports to state the law of the case as it presently exists (pages 203-211, 14 So. 2d) contains the following summing up of the court's holding in the following language:

"The net result is that our opinion of December 31, 1942, is receded from insofar as it applies to ad valorem taxes, and it is modified to harmonize with the views expressed in this opinion insofar as it applies to excise taxes."

On page 210 of 14 So. 2nd, we find the following language:

"If the object of the tax is to pay the cost of issuing the license and for inspecting and regulating the business and a limited revenue is incidentally raised, this alone will not always deprive it of its excise character."

Farther down in the same column on page 210, we find the following language:

"but that it does not exempt from such a tax for inspection and regulation and the cost of the license."

The title of Chapter 14677, Acts of 1931, from which Sections 610.07-610.15, Florida Statutes, 1941, were taken, is as follows:

"AN ACT Requiring Corporations Authorized to do Business in the State of Florida, Both Foreign and Domestic, Annually to File with the Secretary of State Certain Reports and to pay a Certain Tax in the Nature of Filing Fee Thereon."

The language in the foregoing quotation indicates that the Legislature felt that it was providing for a mere excise tax for the payment of the cost of administering the Act by the Secretary of State and that it was not imposing an ad valorem tax or a tax for the purpose of raising revenue.

This fact is further strengthened by the schedule of filing fees which is not based upon any assessment of the value of the stock but merely graded in amount by reference to the capital stock of the corporation, and in the instant case it appears that five hundred dollars instead of being paid upon the value of the stock is paid upon a grouping of stocks of a par value of from five hundred thousand dollars to one million dollars.

There is an even stronger indication that the Legislature considered the tax in question as a mere excise tax. It is to be found in Section 6, which reads as follows:

"being regulated by paying excise taxes under other provisions of law."

As will be noted from the quotation from Section 6, the reason assigned for exempting the corporation mentioned in it was that they were paying excise taxes under other provisions of law.

It may be said therefore that the proper construction of the law requiring the payment of the funds sought to be recovered is that the tax is an ordinary excise tax. When one considers the manifold duties of the Secretary of State in dealing with the annual returns of corporations, it is quite evident that it was not intended as a revenue raising measure, because the excess over and above the cost of administration, if any, would be a negligible amount.

There is one other consideration which should be weighed in deciding this matter and that is the nature of the condition being performed by a foreign corporation when it seeks permission to enter this state and continue to do business therein. When so considered it appears that the tax in question while called an excise tax, is one, the payment of which per-



forms a separate, distinct and all-important function in that the payment of it is necessary to preserve its right to do any business in the State.

From the foregoing it would appear and it is my opinion that the right to claim this exemption is not free from doubt and apparently cannot be made sufficiently clear to warrant the requested refund without being submitted to the courts.

July 6, 1944.—044-193.

#### FILING FEE—MORRIS PLAN BANKS

**QUESTION:** Are Morris Plan Banks exempt from the payment of the filing fee or tax required by Section 610.08, Florida Statutes, 1941?

*To Honorable R. A. Gray, Secretary of State:*

Section 610.07, Florida Statutes, 1941, requires the corporations named therein to file annually with the Secretary of State a sworn report covering the matters named therein, there being excepted from the operation and effect of said section certain types of corporations, among which are banks and trust companies. Section 610.08 sets forth the amount of the filing fee or tax required of a corporation filing such report. These sections of our statutes became law in 1941.

Section 656.02, Florida Statutes, 1941, provides, among other things, that Morris Plan Banks shall pay the fees and comply with the procedure provided for the organization and government of ordinary corporations for profit under the laws of this state and "including the requirements for annual reports and franchise fees and taxes." This became law in 1935.

Chapter 21842, Acts of 1943, provides:

"That all banks, trust companies and Morris Plan Banks, now or hereafter chartered under the laws of the State of Florida, shall have the same immunity from State and local taxation that National Banking Associations have from time to time under the statutes of the United States."

It appears that prior to the passage of the last mentioned act Morris Plan Banks were required to make reports and pay the filing fee or tax required by said Sections 610.07 and 610.08. Such capital stock filing fee or tax is an "excise tax," a "franchise tax." Jacksonville Gas Company, et al. v. Lee, State Comptroller, Fla. 148 So. 188; Gray, Secretary of State v. Central Florida Lumber Company, Fla. 140 So. 320.

As a result of the provision of Title 12, Section 548, U. S. Code, Ann., an excise or franchise tax of the nature provided by said Section 610.08 could not lawfully be imposed on national banking associations, even though banks and trust companies were not excepted from the requirements of said Sections 610.07 and 610.08. The shares of stock in a national bank held by shareholders is quite a different property entity from the capital stock of the bank; and such shares may be assessed against their owners, but the capital stock of national banks cannot be taxed by state authority. *Roberts v. American National Bank of Pensacola, Fla.*, 121 So. 554. Since by said Chapter 21842 all banks, trust companies and Morris Plan Banks are granted the same immunity from state and local taxation that National Banking Associations have under the statutes of the United States, it appears that Morris Plan Banks have the same immunity from such tax that National Banking Associations have.

For the reasons stated, the above question is, in my opinion, properly answered in the affirmative.

**FOREIGN CORPORATIONS**

June 8, 1944.—044-165.

**PERMITS—CORPORATIONS BEARING THE SAME NAME**

**QUESTION:** Do the laws of Florida preclude the issuance of a permit to a foreign corporation to transact business in this state when said foreign corporation bears the same name as a Florida corporation?

*To Honorable R. A. Gray, Secretary of State:*

Section 613.08 provides that no permit shall be issued to any foreign corporation to transact business or to acquire, hold, or dispose of property in this state under any corporate name which is or may be the same as the corporate name of any corporation organized or existing under the laws of the State of Florida, or so nearly similar thereto as to cause or tend to cause confusion.

It is noted that the above provision of law was recognized in the case of *Scalise, et al. v. National Utilities Service, Inc.*, 120 F. 2d. 938, the opinion in that case having been rendered by the Circuit Court of Appeals, Fifth Circuit, June 20, 1941.

It is, therefore, my opinion that since there is a corporation "organized" and "existing" under the Laws of Florida bearing the same name as that of the above mentioned foreign corporation, the provision of law mentioned above precludes you from issuing such permit to the latter corporation.

## CHAPTER XXIX

### INSURANCE

#### GENERAL PROVISIONS

August 26, 1943.—043-220.

#### ASSETS—FOREIGN INSURERS

**QUESTION:** May a foreign insurer use as qualifying assets approved securities which are and will be continually pledged as collateral to secure the repayment of a loan obtained under a financing agreement between the insurer and some banking institution, when the insurer seeking to qualify in this state holds one hundred per cent reinsurance agreements with insurers authorized to do business in this state?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 626.05, Florida Statutes, 1941, among other things provides as follows:

"No foreign insurer, unless otherwise expressly provided, nor any agent or representative thereof, shall transact any insurance business in this state, unless such insurer be possessed of assets worth at least two hundred fifty thousand dollars, invested in bonds of the United States, of any state or of any county or municipality in the United States, or in mortgages or deeds of trust on improved and unencumbered real estate, worth not less than fifty per cent more than the amount loaned thereon, at market value."

The word "assets" which appears in the foregoing quotation is commonly understood to mean any property available for the payment of debts. As used in the foregoing statute, it should be construed as meaning property of the specified value available for the payment of obligations to policyholders, since the purpose of the requirement is to insure the solvency of insurers and thus protect policyholders. If the qualifying assets have been previously pledged as security for the payment of a loan, such assets would not be available for the payment of obligations to policyholders.

It is my opinion that the word "assets" as used in said section contemplates assets in excess of liabilities, and it is further my opinion that these assets pledged for the payment of a loan cannot subsequently be used as an "asset" in computing qualifying assets under Section 626.05, *supra*.

The reinsurance agreements attached to your request could not, in my opinion, be considered as a part of, or in lieu of, the assets necessary for qualification, for the simple reason that such reinsurance agreements, even if considered to be assets, still would not constitute investments of the type approved by the above section of the statute.

It is, therefore, my opinion that the applicant insurer may not qualify under the quoted provision of our law where its qualifying assets have been previously pledged as collateral.

## AGENTS

February 2, 1944.—044-43.

## LICENSE TAXES—NONRESIDENTS

QUESTION: 1. In the event another state charges a Florida resident agent, applying for a nonresident agent's license in that state, a license tax of \$5, for example, does Chapter 21774, Acts of 1943, require the Insurance Commissioner to charge a resident agent of that state, applying for a nonresident agent's license in Florida, a license tax of \$5, or would the \$6 license tax and \$1.50 qualification tax (the latter in case of fire and casualty agents) as charged Florida agents be the proper charge?

2. If another state charges a Florida resident agent applying for a nonresident agent's license in that state, a license tax of \$20, does Chapter 21774 require the Insurance Commissioner to charge a like tax of a resident agent of that state applying for a nonresident agent's license in Florida?

3. Chapter 20263 requires all first time applicants for Florida resident agents' licenses (fire, casualty, and miscellaneous) to stand an examination, and pay an examination fee of \$10. Let us suppose that a resident agent of a state which does not require an examination of a Florida agent applying for a nonresident agent's license in that state applies for a Florida nonresident agent's license. Does Chapter 21774 contemplate that the Insurance Commissioner should require the applicant for nonresident agent's license to take the examination and pay the examination fee?

4. Chapter 20327 does not require an examination of an applicant for Florida resident life insurance agent's license. Let us suppose that a resident life insurance agent of a state which requires an examination of and payment of a fee by a Florida resident life agent applying for a nonresident life insurance agent's license in that state applies for a Florida nonresident agent's license. Does Chapter 21774 contemplate that the Insurance Commissioner should give the nonresident applicant an examination, and charge an examination fee, as a prerequisite to issuing him a nonresident life insurance agent's license?

5. Do nonresident agents' licenses expire in accordance with Chapter 21802, Laws of Florida, Acts of 1943, regardless of the expiration dates of nonresident agents' licenses issued by other states?

6. Chapter 20263 makes no provision for the licensing of Florida resident brokers. Does Chapter 21774 contemplate that the Insurance Commissioner should issue a nonresident broker's license to a resident broker of a state which licenses agents and brokers?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In an opinion dated July 6, I discussed Chapter 21774, *supra*, and advised you that it contemplates the issuance of nonresident agents' and nonresident brokers' licenses under the same terms and conditions as the same are issued by other states to Florida resident agents doing business therein. I did not mean to infer by that language that Florida must adopt the identical licensing requirements of the other states.

You will observe from the title of the Act that it is purely retaliatory and is not intended in the least to be reciprocal. Therefore, we must construe it as meaning that whenever the other state imposes some obligation, restriction, tax, fee or prohibition in excess of that imposed by Florida on Florida's own resident agents, then Florida must impose similar excess obligations, etc., upon applicants from such other states. This Chapter 21774 must be read in *pari materia* with other insurance licen-



sing statutes of our state, and, frankly, I cannot believe that the Legislature ever intended by this Act to make it possible for nonresidents to secure insurance agency privileges in Florida by meeting less requirements than those imposed by Florida upon Florida's own resident agents.

In the light of the foregoing discussion, I answer your questions as follows:

1. The regulatory \$6 license tax and the \$1.50 qualification tax (the latter in case of fire and casualty agents) as charged Florida agents would be the proper charge to be imposed upon nonresidents under the facts set out in question 1.

2. Your second question is answered in the affirmative.

3. The nonresident applicant should be required to take the same examination and pay the same fee as Florida agents under the facts set out in question 3.

4. Under the factual situation described in question 4, the non-resident applicant should be required to take an examination and pay the fee as required of Florida applicants in his state.

5. I answer question 5 in the affirmative.

6. In my opinion, Chapter 21774, *supra*, does not contemplate the issuing of any license which is not issued by you to residents of Florida.

December 10, 1943.—043-323.

#### LICENSES—AUTOMOBILE DEALERS

**QUESTION:** Several automobile dealers have applied to the Insurance Commissioner for licenses as insurance agents. These applicants desire a limited license, one covering only fire, theft (comprehensive) and collision insurance on motor vehicles which they sell. In connection with the foregoing, may such applicants, if found to be qualified by examination, be licensed as insurance agents to sell insurance as above described, on motor vehicles sold by them, in view of the provisions of Section 627.05, Florida Statutes, 1941?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Under date of June 25, 1943, I rendered you an opinion in which I held that an automobile dealer could be licensed as an insurance agent, and that such license could be limited to certain lines and types of insurance.

The licensing of agents to write automobile insurance is governed by Section 627.05, Florida Statutes, 1941. This statute requires you, as Insurance Commissioner, to subject each first time applicant to an examination as to his qualifications to act as such agent or solicitor. You are also required by this statute to satisfy yourself that all license and qualification taxes required have been paid and that the applicant:

"(1) Has such business reputation as to make it possible that he can and will carry on the business of an agent or solicitor without detriment to the public;

"(2) Has had experience, instruction or training in said respective line of insurance;

"(3) Is reasonably familiar with the insurance laws of this state and with the provisions, terms and conditions of the policies or contracts he proposes to solicit, negotiate or effect; and

"(4) Intends to actively engage in the business covered by such a license and in good faith to serve the public and is not procuring the license chiefly for the purpose of obtaining a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested or with which he is connected."

The foregoing statute is designed to protect the public interest and welfare by permitting only those to be licensed as insurance agents who are qualified to so act by education, training and experience, and who intend to actively engage in the insurance business and serve the public in good faith.

"To actively engage" in the insurance business does not mean "to exclusively engage" in such business. One may devote only part of his time to his insurance business and at the same time be actively engaged therein.

Where one procures a license chiefly for the purpose of obtaining a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested, such person cannot be said to be serving the public in good faith. This provision of the statute is aimed not at preventing rebates or commissions on such class of business, but as a guide in determining the bona fide intentions of the agent.

The ultimate goal to be attained under this statute is the licensing of only those applicants who satisfy the Insurance Commissioner of their bona fide intention to serve the public faithfully and the powers and duties of the Insurance Commissioner, in administering said Act, are discretionary as distinguished from ministerial, in determining whether the agent applying, under the set-up surrounding his agency, has a bona fide intention to serve the public faithfully, and whether or not such agent is procuring the license chiefly for the purpose of obtaining a rebate or commission on insurance written for himself, his family or some partnership or corporation in which he is interested or with which he is connected.

1. If an automobile dealer licensed as an insurance agent undertakes to place insurance upon automobiles sold by him, and in doing so delivers such a policy of insurance as will fully protect the interest of the purchaser of said automobile rather than limiting the insurance coverage to the interest of the lienor, if any, and the policy discloses such coverage in a readily discernible manner so that the purchaser has full knowledge of the extent of his coverage, then such automobile dealer acting as an insurance agent has met the requirement of law with reference to serving the public in good faith.

2. If an automobile dealer licensed as an insurance agent undertakes to place insurance upon automobiles sold by him and manufactured by a company which owns the insurer whose policies he is selling, and in doing so delivers such a policy of insurance as will fully protect the interest of the insured, according to the extent desired by said insured, and there is nothing about the policy itself which in any wise conceals the nature and character of the contract being dealt with, the facts that the company manufacturing the car being sold owns the insurer who furnishes the policy of insurance being sold, and that the dealer for the car is one and the same agency as the agent for the insurance, do not in my opinion create any presumption that such agent is procuring the license chiefly to obtain a rebate or commission on insurance written for himself, his family or some partnership or corporation in which he is interested.

Of course, if the purchaser of the automobile merely wants sufficient insurance to cover the amount of a lien which may be outstanding from time to time, there could be no objections to that type of coverage provided it is clear that the purchaser is aware of the extent of such coverage.

Therefore, with reference to the licensing of insurance agents, whether they are engaged in the automobile business or not, the primary duty of the Insurance Commissioner is to see that licenses are issued only to those who intend in good faith to serve the public and who meet the other

requirements of the statute as to reputation, experience, education and training.

Whenever any applicant for a license, who is a dealer for the manufacturer of the product which he is selling, and who seeks such license for the purpose of issuing insurance policies over such product, satisfies the Insurance Commissioner as to the matters described in paragraphs numbered 1 and 2 of this opinion, and as to his reputation, knowledge, experience and training, and also satisfies the Commissioner that the policies to be written by him will give the insured the protection he thinks he is buying, then such applicant is entitled to be licensed as an insurance agent.

I have examined the sample policy of insurance which was attached to your request, and it appears to be the same general type of policy issued by other insurance companies engaged in this type of business, a form of policy which I understand is standard among such companies and is the type of insurance coverage generally sold by other insurance agents soliciting and writing automobile insurance.

It is, therefore, my opinion that the applicants referred to in your request are entitled to be licensed as insurance agents when you have satisfied yourself as herein specified.

April 28, 1944.—044-142.

#### LICENSES—ISSUANCE; PART TIME WORK

QUESTION: 1. How much "working time" should an insurance solicitor devote to such business in order that it may be said that he is "actively engaged in such business and in good faith serves the public in such business"?

2. Section 627.04, Florida Statutes, 1941, requires that the permanent place of business of an insurance solicitor shall be, during the term of his license, in the office or place of business of the insurance agent by whom he is employed. In an instance where an associate in a real estate firm has a desk at the address of such firm and spends the "working day" at such address and place of business, granted that such person has otherwise met all the legal prerequisites to be licensed as an insurance solicitor for a duly licensed insurance agent, located in the same city, but whose address is separate and removed from the address of such real estate firm, would it be proper that such person be issued a license as an insurance solicitor for such agent?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In my opinion these questions are properly answered as follows:

1. An insurance solicitor, among other requirements, must be employed by a duly licensed insurance agent. Section 627.08, Florida Statutes, 1941. In his application for license he is required to state the name of the agent by whom employed. Section 627.03. After meeting the requirements of Sections 627.03 and 627.05, pertaining to application and examination for license, and the Insurance Commissioner is satisfied, among other essential findings, that the applicant "intends to actively engage in the business covered by such a license and in good faith to serve the public and is not procuring the license chiefly for the purpose of obtaining a rebate or commission on insurance written for himself or his family, etc.," a license shall be issued such applicant. Section 627.05.

On January 17, 1942, this office delivered an opinion that a duly licensed insurance agent who devoted only one hour each day to his insurance business, the balance of the day being engaged as secretary of a company not an insurance company, was not violating any of the pro-

visions of Section 627.15, which sets forth grounds for revocation of license (Biennial Report of Attorney General, 1941-42, page 726). This rule may be applied to an insurance solicitor.

To attempt arbitrarily to fix the least possible time a solicitor would have to engage in soliciting insurance to constitute "to actively engage in the business" is hardly possible. A study of Sections 627.05 and 627.15 leads me to the conclusion that there is little if any relationship between this element of "time" and the above quoted provision "and in good faith to serve the public." The Insurance Laws of this state with respect to the qualification and licensing of agents and solicitors and the soliciting, writing and issuing of insurance are for the welfare, protection and benefit of insurers, agents and solicitors, and the public they serve. In view of the purpose of these laws, it seems to me that this item of "time" is of minor importance. If an applicant is licensed as a solicitor and then fails to "actively engage in the business," the competitors of his agent can hardly complain, for they will not suffer thereby, the public will not suffer, and his agent can at any time terminate the relationship.

It is your duty to satisfy yourself, among other things required by Section 627.05, that the applicant intends to "actively engage in the business." If an applicant for solicitor's license otherwise meets all the prerequisites of the law and you find he intends to "actively engage in the business" **for all or any part of his time**, in my opinion you should issue him a license.

2. In considering this question, it is noted that the factual situation presented recognizes that the person involved will be "actively engaged" as an insurance solicitor.

Section 627.04 provides that no license shall be issued to any solicitor unless it affirmatively appears from the application that "his permanent place of business is and will be, during the term of his license, in the office or place of business of the insurance agent by whom he is employed." In this section of the law there is an exception to this requirement not applicable to the situation presented by this question.

"Place of business" is the place where a man usually transacts his affairs or business, whether that be his own store, shop or office, separate and distinct from other persons, or whether that be the office, shop and the like occupied and used by another, if he has no independent place of his own. *H. V. Smith Supply Co. vs. Black*, 88 Pac. 2d, 269, 43 N. M. 177. As used in the above Section 627.04, in my opinion the phrase "permanent place of business" refers to the business of a solicitor as an insurance solicitor, as distinguished from any other profession or trade in which he may be engaged.

It appears from the situation related in the above question that "such person has otherwise met all the legal prerequisites to be licensed as an insurance solicitor." It is my opinion that if you find that, during the term of his license, the applicant for license recognizes and intends to use the office of the agent by whom he is employed as his only place of business as such solicitor, and that such papers, books, records and/or accounts as may be used, maintained or required by or for him with respect to his business as such solicitor shall be kept at the office of such agent, then you may find that the office of such agent will be the "permanent place of business" of such person as a solicitor for such agent; and with respect to this requirement it would be proper to issue such person a solicitor's license.

June 25, 1943.—043-145.

#### LIMITED LICENSES—AUTOMOBILE DEALERS

QUESTION: 1. Does the law contemplate that an automobile dealer may be licensed as an insurance agent and engage in the automobile and insurance business at the same time?



2. May a license be limited to a special line of insurance, such as automobile, fire, theft (comprehensive), and collision insurance?

3. If a license may be so limited, may the examination of the applicant be similarly limited?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

With reference to your first question, the Insurance Laws of this state do not attempt to confine the business of insurance agents to those who shall make it their exclusive or principal business. To attempt any such regulation or limitation would, in my opinion, be a purely arbitrary restriction and therefore unconstitutional. It has been held that there is no good reason for, and no public interest can conceivably be served by, prohibiting persons from transacting business as insurance agents in connection with any other lawful business or occupation. See *Hauser v. North British and Mercantile Insurance Company*, 206 N. Y. 455, 100 N. E. 52.

It is quite common in this state to find real estate agents likewise carrying on business as insurance agents. I can see no valid distinction between real estate agents and automobile dealers so far as your first question is concerned.

It is therefore my opinion that an automobile dealer may be licensed as an insurance agent and engage in the automobile and insurance business at the same time.

With reference to your second question, Section 627.03, Florida Statutes, 1941, provides that an applicant for license as an insurance agent shall file with the Insurance Commissioner his written application for the license authorizing him, among other things, to engage in any special line of the general insurance business which may lawfully be written in this state and that such applicant shall make sworn answers to interrogatories setting forth, among other things, that the applicant is qualified by knowledge, experience or instruction, in the line of insurance for which he or she may be specifically licensed.

It is my opinion that under the foregoing provisions a special and limited license may be issued for automobile, fire, theft (comprehensive) and collision insurance, which constitutes a special line of the general insurance business which may lawfully be written in this state.

Concerning your third question, it is my opinion that the examination provided for by the statutes may be limited to the special line of insurance business to be engaged in by the applicant, since the purpose of the examination is to demonstrate the applicant's qualifications for carrying on the business in which he seeks to engage.

September 16, 1943.—043-246.

#### RESIDENT AND NONRESIDENT AGENTS

**QUESTION:** What is the intent and meaning of the words "agency" and "territory" as used in Section 1, Chapter 22053, Laws of Florida, Acts of 1943?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

It is my opinion that the word "agency" as used in said section is synonymous with "agent."

The word "territory" in said section, in my opinion, contemplates a definite area within the State wherein the agent is authorized to solicit and sell insurance by the company which he represents.

Further construing Chapter 22053, it is my opinion that life insurance policies must be written or delivered through a licensed agent who is a resident of the State of Florida, or where the particular company involved has no licensed agent who is a resident of this state, then the insurance policy may be written or delivered through a nonresident who holds a Florida license and to whom has been assigned a definite territory within the State of Florida. In this connection, I call your attention to the fact that under Section 635.01, Florida Statutes, 1941, only those nonresidents are entitled to a license to solicit or sell life insurance in this state who reside in a state which issues licenses to residents of Florida to sell and solicit insurance in such other state.

### RECIPROCAL

March 8, 1944.—044-80.

### FLORIDA CITRUS EXCHANGE

**QUESTION:** 1. May Citrus Exchange Associations establish and maintain a reserve for the payment of losses by fire sustained by members, without conforming to the Insurance Laws of Florida?

2. If it is necessary for the cooperatives to conform to the Insurance Laws of Florida, is there any reason why they cannot form a reciprocal, or inter-insurance group for the exchange of contracts as provided by Chapter 628, Florida Statutes, 1941?

3. Does not Section 628.09 authorize cooperatives to exchange such contracts?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

1. In reply to this inquiry I beg leave to state that the proposal outlined appears to be for an organization or arrangement or a reciprocal or inter-insurance relationship and comes within the true intent and meaning of Chapter 628, Florida Statutes, 1941.

Section 628.01, Florida Statutes, 1941, reads as follows:

**"Reciprocal insurance authorized.**—Individuals, partnerships and corporations of this state, designated subscribers, may exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, except life insurance."

After providing for the making of such agreements or arrangements the statutes provide for the filing with the Insurance Commissioner a declaration setting forth the matters indicated by Subsections (1) to (7) inclusive of Section 628.03.

By Section 628.05 statements are required to be filed and by Section 628.06 a reserve fund and surplus is required to be maintained as shown by Section 628.06.

By other sections of the Act annual reports, examinations, annual certificates and license taxes are provided for.

By Section 628.15 a penalty for exchanging contracts of indemnity without complying with the law is set forth.

By Section 628.14 it is provided that except as provided in the chapter (628) no law of this state relating to insurance shall apply to the exchange of such indemnity contracts unless they are specifically mentioned.

By Section 9 of Chapter 20671, Acts of 1941, it is provided that every person, firm, partnership, association and corporation writing insurance on fire risks in the State of Florida shall report to the Insurance Commis-

sioner all fire losses, etc. This section does not, however, mention specifically the kind and character of reciprocal or inter-insurance provided for in Chapter 628, but an opinion issued by this office under date of January 13, 1942 stated that for the reasons mentioned insurers operating under the law governing reciprocal insurance were required to make the reports provided for under Chapter 20671, Acts of 1941. (See opinion in Biennial Report of the Attorney General, 1941-1942, pages 727 and 728).

In the Biennial Report of the Attorney General, 1939-1940, is set forth an opinion by the Honorable George Couper Gibbs, then Attorney General, that the language of Section 628.14 is brought forth from the previous statutes mentioned, that the insurance agents' Qualification Law as embodied in the first mentioned said statute does not specifically mention the exchange of indemnity contracts as defined by the statutes as relating to reciprocal insurance and that such statutes are not applicable to reciprocal insurance. (See opinion, page 124, Biennial Report of the Attorney General, 1939-1940).

Under the state of law as above set forth your question should be answered in the following manner, that is to say: it is my opinion that associations as described in the enclosed letter could not conduct such a business in Florida without complying with the terms and provisions of Chapter 628, and that the reserve to be maintained should be such a reserve fund and surplus as provided for in Section 628.06.

2. & 3. I beg leave to state that it is my opinion that there is no reason why they cannot form a reciprocal or inter-insurance group for the exchange of contracts provided for in Chapter 628, Florida Statutes, 1941 and that Section 628.09 authorizes cooperatives to exchange such contracts but upon complying with the conditions set forth in Chapter 628.

#### MUTUAL FIRE INSURANCE ASSOCIATIONS

March 30, 1944.—044-107.

#### CITRUS GROWERS

QUESTION: May the Insurance Commissioner grant a license to an organization composed of citrus growers, to transact an insurance business on the mutual plan, for the protection of its members against loss from frost and cold, where such organization holds not less than \$100,000 in prescribed investments?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Corporations are creatures of the statutes, hence, unless there exists statutory provision for the creation of an insurance business on the mutual plan as mentioned above it cannot be done.

In my opinion we have no law authorizing the creation of such a corporation for the purpose stated. The nearest approach to it is found in Chapter 632, Florida Statutes, 1941, providing for domestic mutual fire insurance associations, but the risks authorized to be assumed by such associations as set forth in Section 632.08 do not include the risk mentioned in this proposed plan.

I understand the person requesting the license is not interested in reciprocal or inter-insurance as provided and authorized by Chapter 628, Florida Statutes, 1941. However, it may be there is a possibility that this proposed plan could be fitted into this form of insurance. On March 8, 1944, this office delivered to you a rather extended opinion relating to Chapter 628. While that inquiry had to do with "associations," as set forth in that opinion and in the above chapter, such insurance is authorized for "individuals, partnerships and corporations."

Since I consider the plan for insurance proposed above, reasonable and laudable, I regret very much that I cannot furnish you with a more satisfactory answer.

**LIFE INSURANCE, GENERALLY**

January 9, 1943.—043-4.

**CONTINGENT MORTALITY ENDOWMENT CONTRACTS**

**QUESTION:** May life insurance companies, mutual aid associations, or fraternal benefit societies issue at the present time so-called contingent mortality endowment contracts to new members or policyholders, placing such members in a vacancy existing in a group formed before the passage of Chapter 20856, Acts of 1941, where such vacancy exists either by reason of the fact that the group was never fully made up, or, if such group had been fully made up, the vacancy exists by reason of the death of a member or the maturity of a contract membership by payment of the endowment or otherwise?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

These so-called contingent mortality endowment contracts were recognized by the Legislature of 1941 and regulated by Chapter 20856, Acts of 1941.

This Act prohibits the writing of such contracts in the future except under certain specified conditions.

The express conditions touching upon the question you have raised are found in Section 2 of the Act, and in substance provide that companies operating on this plan may continue to do so provided no policyholder or member shall be placed in any class or division which did not contain subsisting policies, contracts or certificates therein at the time said Act became a law.

The Act in question became a law June 12, 1941, and in my opinion no new classes or divisions could be set up subsequent to that date, nor could any policyholder or member be placed in any class or division existing on that date unless such class or division contained at that time a subsisting policy.

Any present vacancy in a class or division, which class or division existed on June 12, 1941, and contained a subsisting policy on said date, may be filled by placing a new policyholder or member in such class or division.

This Act is subject to much criticism, in that it discriminates against all other companies wishing to write such contracts, but which did not write them prior to June 12, 1941. It creates and perpetuates a monopoly of this sort of business in favor of those companies operating on this plan as of June 12, 1941. However, to hold it unconstitutional by reason thereof would leave no regulation of such contracts, and it is my opinion that you should abide by and enforce the same until it is either amended or repealed by the Legislature or stricken down by the courts.

**SICK AND FUNERAL BENEFITS**

April 7, 1944.—044-118.

**COMMISSIONER—DUTY**

**QUESTION:** A sick and funeral benefit insurance company was organized in 1927 and commenced business in 1928. This company, in accordance with the law then existing, deposited with the Insurance Commissioner \$5,000, and at this time such deposit is approximately \$6,500. Said company has not increased the deposit with the Insurance Commissioner as required by Chapter 21845, Acts of 1943, (Section 638.03, 1943 Supplement, Florida Statutes, 1941), and on October 1, 1943, the date for the renewal of the license of said company, no license was granted this company. Several attempts have been made by interested parties to



buy the company's business, but it has been impossible to effect a sale thereof, inasmuch as less than the controlling stock has consented to make the sale. What proceedings must be followed to protect said company's policyholders and stockholders?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 21845, Acts of 1943, (Section 638.03, 1943 Supplement, Florida Statutes, 1941), provides that no insurer doing a sick and funeral benefit insurance business, whether incorporated under the laws of this state or some other state or country, shall be permitted to transact business in this state after August 1, 1943, unless it shall have deposited with the Insurance Commissioner of Florida \$25,000 in cash or in bonds of the United States, or of any of the counties or municipalities of this state, acceptable to the Insurance Commissioner, to be held by him in trust for the protection of the lawful claims of policyholders in this state.

The duty of the Insurance Commissioner with respect to this situation seems explicitly set forth in Section 638.12, 1943 Supplement, Florida Statutes, 1941, a pertinent part of which is quoted as follows:

**"638.12 Duty of Insurance Commissioner.**—Before issuing the certificate of authority provided in this chapter, or any renewal thereof, the Insurance Commissioner shall fully investigate and examine the financial responsibility of all insurers applying to do a sick and funeral benefit insurance business in this state, and said Insurance Commissioner shall be fully satisfied that the assets, investments and deposits of such insurer fully comply with the requirements of this chapter. Whenever, after examination, the Insurance Commissioner is satisfied that any insurer writing sick and funeral benefit insurance has failed to comply with any provisions of this chapter, or other law applicable to such insurer, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, or that its management or condition is such as to render its further transaction of business hazardous to the public, its members or creditors, or if any of its officers or agents refuses to submit to an examination as authorized by this chapter, or refuses to perform any legal obligation relative thereto, the insurance commissioner may present the relevant facts to the attorney general who shall, if he deem the facts and circumstances warrant, commence an appropriate action in a court of competent jurisdiction and such court may forthwith issue a temporary injunction restraining the insurer from further transacting any business until a full hearing can be had. If, after a full hearing, it appears to the court that in the interest of the public, the insurer's policyholders or creditors, the insurer should be dissolved, the court may make the injunction permanent, and appoint one or more receivers to take possession of the books, papers, moneys and all other assets of the insurer, to liquidate its assets, distribute its funds and otherwise settle its affairs in such manner, and upon such terms and conditions as the court may direct."

It is suggested that if any action against this company is contemplated under the provisions of the above Act, that an examination of the company be made to ascertain the nature and conditions of its assets, investments and liabilities.

July 7, 1944.—044-183.

#### HEALTH AND ACCIDENT INSURANCE CLASSED AS SICK AND FUNERAL BENEFIT

**QUESTION:** May health and accident insurance business be classed as sick and funeral benefit business and do companies doing health and accident business come under the provisions of Chapter 21845, Laws of Florida, Acts of 1943?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 625.01 (8), Florida Statutes, 1941, defines "sick and funeral benefit insurance" as follows:

"(8) 'Sick and funeral benefit insurance' is any policy, contract or agreement whereby an insurer stipulates to provide for the insured either medical attention, medicine, care during disability caused by sickness or injury, expenses of funeral in case of death or the money necessary for any of the aforesaid purposes in lieu of such services."

Chapter 21845, Acts of 1943, amends Section 638.03, Florida Statutes, 1941, and provides that no insurer doing a sick and funeral benefit insurance business, whether incorporated under the laws of this state or some other state or country shall be permitted to transact business in this state after August 1, 1943, unless it shall have deposited with the Insurance Commissioner \$25,000 in cash or bonds as described and as required by such Act.

Initially, it is my opinion that said Chapter 21845 did not affect 638, Florida Statutes, 1941, ("Sick and Funeral Benefit Insurance") other than to increase the required deposit to \$25,000, which theretofore had been \$5,000.

The following insurers are excepted from the effects of Chapter 638:

(1) Life insurance companies organized under the laws of Florida which have qualified and obtained certificates to do a life insurance business in this State (Section 638.10); and

(2) Life and accident insurance companies "now or that may hereafter be organized to do business in this State under the regular insurance laws." It is pointed out that prior to the adoption of Florida Statutes, 1941, the emphasized word "organized" was "authorized"; and research has developed that such change was the result not of revision but purely of error. In view of the apparent legislative intent with respect to these laws, and the further remarks below, in my opinion such word "organized" is to be construed "authorized."

A study of the history of Chapter 638 (Chapter 5222, Acts of 1903; Chapter 5459, Acts of 1905; Chapter 7299, Acts of 1917; Chapter 7872, Acts of 1919; Chapter 9149, Acts of 1923; Chapter 10152, Acts of 1925; Chapter 19306, Acts of 1939; Chapter 21845, Acts of 1943) leads me to the conclusion that two general classes of insurers are contemplated by this law as authorized to do a sick and funeral benefit insurance business in this state under the conditions and having qualified as set forth below, viz.:

(1) Domestic companies organized exclusively for that purpose (Section 638.02), which must make the deposit required by said Chapter 21845, set up certain reserves (Section 638.04), and maintain investments of not less than \$25,000 (Section 637.07);

(2) Foreign insurers who shall maintain investments of not less than \$50,000 (Section 638.09), make the \$25,000 deposit required by said Chapter 21845, and set up certain reserves (Section 638.04); and

(3) Those insurers excepted by Sections 638.01 and 638.14, who are authorized to do business in this state under the regular Insurance Laws. It is pointed out that adequate investments are required of such insurers (Sections 626.04, 626.05 and 626.06).

In my opinion, it was never the intention of the sick and funeral benefit Insurance Laws of this state that domestic life and other life and accident companies which had qualified to engage in the insurance business under the regular insurance laws of this state should be required, in addition, to qualify further as required by Chapter 638 before engaging in the business of sick and funeral benefit insurance; and it is my further

opinion that the provisions of Chapter 638 are directed and applicable only to those insurers who meet the requirements of the provisions of said chapter and who are not qualified under the regular Insurance Laws. These qualifications required of such insurers are for the benefit of their policyholders; and the reasonableness of the foregoing conclusions in the light of such purpose is instantly apparent.

In view of the foregoing, it is my opinion that the inquiries contained in your letter are properly answered as follows:

Under the aforesaid definition in the Insurance Laws of Florida, health and accident insurance is "sick and funeral benefit insurance."

Insurers engaged in this state in the sick and funeral benefit insurance business are required to make the \$25,000 deposit with the Insurance Commissioner as required by said Chapter 21845 provided the following classes of insurers are excepted from such requirement, viz.:

(1) Life insurance companies organized under the Laws of Florida, which have qualified and obtained certificates to do life insurance business in this state; and

(2) Life and accident insurance companies now or hereafter authorized to do business in this state under the regular Insurance Laws.

### BURIAL INSURANCE

March 28, 1944.—044-104.

#### CONVEYANCE IN TRUST—RELEASE

**QUESTION:** 1. Where an insurer conveys real estate in trust to the Insurance Commissioner, for the protection of its policyholders, may the Insurance Commissioner reconvey such property, without the deposit of other property of equivalent value?

2. If so, how may the reconveyance be accomplished?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

On September 10, 1935, an insurer executed a deed of trust, purporting to convey certain real estate to the then Insurance Commissioner, in trust for the protection of its policyholders. This deed provided that the grantor should have the right, at all times, to substitute other property, real or personal, for the property so conveyed; and upon such substitution the said Insurance Commissioner was to release the lands so conveyed. This instrument was recorded in the mortgage records in Duval county. However, there is no record evidencing the receipt of such deed in the office of the Insurance Commissioner. Money and bonds totaling \$1,900.00 have been delivered to the Insurance Commissioner, by or for the grantor. Upon this statement of facts the above questions are posed.

Answering the first question, I am of the opinion that you cannot reconvey the real estate described in the deed without deposit of other property of equivalent value, satisfactory to you. The reasons for this are as follows:

In my opinion, you, as State Treasurer and Insurance Commissioner, and as successor to the original grantee (i. e., trustee) named in the deed of trust, are vested and charged with the same rights and responsibilities as were received and incurred by the original grantee named in the deed of trust. A reading of the entire instrument warrants this conclusion.

Since the instrument appears to be recorded in the public records of Duval County, Florida, the fact that you have no record of it in your office seems immaterial.

A release of all or any of the real property embraced in the instrument may be effected by you upon the substitution by the above insurance

company for such property sought to be released, of other property, real or personal, of equivalent value satisfactory to you.

You will know whether or not the \$1,900.00 in cash and bonds were delivered to you with the understanding that they were to be substituted for the parcel of land sought to be released, and, if so, whether such sum is equivalent in value to the parcel sought to be released. If such is not the case with respect to such cash and bonds, in my opinion the delivery of the same to you would not meet the requirements of the instrument with respect to a release.

The answer to your second question is found in the above answer to the first question.

### **BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS**

January 11, 1943.—043-8.

#### **CONTRACTS—EFFECTIVE DATE OF POLICY**

**QUESTION:** Does the policy provision that the same shall not take effect until delivered to the insured while in sound health and the first premium has been received at the home office of the insurer conflict with the statutory provision that the policy, endorsements, and application shall constitute the entire contract when the delivery date and the premium payment date must be established by extraneous evidence?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 640.17, Florida Statutes, 1941, reads as follows:

**"Contract between association and member.**—Certificates and any endorsements thereon, together with the member's application for benefit certificate, shall be and constitute the entire contract between the member and the association which shall not be altered or any of the conditions therein waived or changed except by the written consent of such association duly executed by its president or secretary and said holder, which written consent shall be attached and shall be and form a part of the insurance contract."

You say that in order to establish the effective date of such policies it is necessary to establish the same from evidence outside the policy and the application which under the statutes constitute the entire contract together with any endorsements on the policy.

Such clauses as the one in question are permissible features for a contract between the insured and the insurer, and are frequently found in insurance policies.

Although a policy of insurance by its terms is to take effect on a certain date, yet it may be shown that, because of failure to comply with some condition precedent, it did not take effect until a subsequent date.

In the event of controversy between the insured and the insurer over the effective date of such a policy, such a controversy would be one of a private nature between the parties to be settled by them wherever the policy does not violate provisions of law coming under your jurisdiction.

It is therefore my opinion that such clauses as referred to by you are permissible and do not in effect violate the provisions of the quoted statute.

June 27, 1944.—044-178.

### **NONPROFIT HOSPITAL SERVICE PLAN**

**QUESTION:** May a corporation of the type contemplated by Chapter 21203, Acts of 1941, which chapter provides for establishing, maintaining and operating a nonprofit hospital service plan, extend its operations beyond the limits of Duval County, where the Circuit Judge, in granting the charter, authorizes it to do so?



*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 21203, Acts of 1941, is a special act, and the title thereof is quoted as follows:

"An act providing for the incorporation, licensing and regulation of Corporations not for profit for the purpose of operating nonprofit hospital service plans by any hospital located in Duval County, Florida, exempting such corporations from all other provisions of the insurance laws of the State of Florida, providing penalties for the violations of the provisions of this Act, and repealing all laws in conflict therewith."

Section 1 of Chapter 21203 is as follows:

"Section 1. **Definition and Scope.**—Any corporation heretofore or hereafter organized under the general laws of the State of Florida as a corporation not for profit, which shall operate a hospital in Duval County, Florida, is organized for the purpose of establishing, maintaining and operating a Nonprofit Hospital Service Plan, in Duval County, Florida, whereby hospital care may be provided by the said Corporation or by a hospital with which it has a contract for such care and which is maintained by the State of Florida or any of its political subdivisions or maintained by a corporation organized for hospital purposes under the laws of the State of Florida or such other hospitals as shall be designated by the Insurance Commissioner of the State of Florida, to such of the public who become subscribers to said Plan under a contract which entitles each subscriber to certain hospital care shall be governed by this Act and shall be exempt from all other provisions of the Insurance Laws of the State of Florida in conflict herewith, unless specifically provided otherwise."

It is noted that your request is made directly in connection with the Florida Hospital Service Corporation, incorporated under the General Laws of the State of Florida as a corporation not for profit and as contemplated by the above Chapter 21203, Acts of 1941. The answers to your question are limited to the Act in relation to said particular corporation. Attached to your letter is a copy of the charter of said corporation and a copy of the order of a Judge of the Circuit Court of Duval County, Florida, dated April 27, 1944, approving the charter and declaring the subscribers thereto, their associates and successors, a corporation. Since receipt of said letter there has been furnished to this office an amendment of Article II of said charter approved by said Judge on June 26, 1944. It is pointed out that Article II of said charter sets forth the general nature and objects of the corporation and the amendment added to the original wording of Article II that hospital care may be provided by hospitals "operating anywhere in the State of Florida as" designated or referred to in Chapter 21203.

While the wording of the title, and Section 1 of said Chapter 21203, are not as clear as they might be, the granting of the charter and the stated amendment thereto is taken and accepted by me as a construction of the Act by the Court with respect to the powers authorized by the Act and granted in said charter to said corporation. Since the Court has specified in Article II of such charter, as amended, that the above corporation, among its other described powers, may provide hospital care by hospitals **operating anywhere in the State of Florida**, the grant of such power in the Act is not questioned and is accepted as within the meaning and intent of the Act.

On the basis of the foregoing, in my opinion, your question is properly answered as follows:

1. The operation of the hospital service plan by the Florida Hospital Service Corporation may be carried out by hospitals designated and referred to in said Charter 21203 operating anywhere in the State of Florida.
2. The plan is available to subscribers located at any point in the State of Florida.

### LIMITED SURETY COMPANIES

October 16, 1944.—044-303.

#### APPEARANCE BONDS—AGGREGATE FOR ONE DEFENDANT

**QUESTION:** May a Limited Surety Company as contemplated by Chapter 649, Florida Statutes, 1941, obligate itself as surety on two \$500.00 appearance bonds required of a single defendant in two separate pending criminal prosecutions?

*To Honorable J. Louis Carter, Clerk, Criminal Court of Record,  
West Palm Beach, Florida:*

Chapter 649, Florida Statutes, 1941, deals with limited surety companies. Section 649.04 provides that no limited surety company shall be granted a license to do business in the State unless it shall own assets (in such form as in said section provided) of an aggregate value of at least \$10,000.00. Section 649.11 provides that no limited surety company shall at any time be absolutely or contingently liable as surety or guarantor upon bonds or other obligations in an aggregate sum of ten times the assets of the company. Section 649.10 limits the amount of each obligation with respect to which a limited surety company may be surety or guarantor in the following language:

“... provided, however, no limited surety company shall execute a bond, agreement, contract of indemnity, guaranty or surety of a sum in excess of five hundred dollars. It is the intention of this chapter that no limited surety company shall execute any single obligation which shall require the payment by it of any sum in excess of five hundred dollars.”

Assume that the defendant in the above question furnishes appearance bonds in the amount of \$500.00 each, with a limited surety company as surety thereon, in each of the two cases mentioned, which cases are returnable to the same court at the same time. It is immediately apparent that the one failure of the defendant to appear at the time and place required will result in the breach of both bonds, requiring payment of \$1,000.00.

Assume, further, that such defendant furnishes an appearance bond for \$500.00 in each of such cases, with a limited surety company as surety thereon, such cases being in different courts and such bonds being returnable on different days to the respective courts mentioned therein. Such bonds may be said to insure against the risk of the defendant's becoming a fugitive from justice as to each of such respective cases. Yet it is immediately apparent that should the defendant fail to appear as required by the bond first returnable, one may reasonably assume that he will breach the second bond unless apprehended by the authorities prior to the occurrence of such latter contingency. This being true, it may be said that for all practical purposes no distinction is to be drawn between this situation and the one set forth in the preceding paragraph.

“In Webster's Unabridged Dictionary ‘obligation’ (in law) is a bond with a condition annexed, and a penalty for nonfulfillment. In Bouvier's Law Dic. (Rawle's Ed.) ‘obligation’ is defined as ‘a bond containing a penalty, with the condition annexed for the payment of money, per-

formance of the covenants or the like.' " Maxwell v. Jackson Loan and Improvement Co. (Fla.) 34 So. 255, 267. In view of this and the setting in which we find the words "single obligation" as used in the above quoted limitation, we may assume that such words refer to a bond or other undertaking with respect to which the limited surety company has become surety or guarantor. A consideration of the two examples given above herein might lead one to conclude that under the stated construction the legislative intent with respect to the limitation is ignored. Such a possibility is recognized. Yet, had the Legislature intended the limitation to apply to a single contingency or to a single individual, as distinguished from a single obligation, it could have so stated. Where the language of a statute is plain and definite in meaning and without ambiguity, it needs no interpretation or construction and itself fixes the legislative intent. *Fine v. Moran*, 74 Fla. 417, 677 So. 533.

In view of the foregoing, it is my opinion that the above question properly should be answered in the affirmative.

## CHAPTER XXX

### BANKS AND BANKING

#### BANKING REGULATIONS

September 29, 1943.—043-248.

#### ASSETS AS SECURITY—FUNDS HELD BY TRUSTEE IN BANKRUPTCY

**QUESTION:** In connection with the Bank of Malone Receivership now being liquidated under the Laws of Florida, bankruptcy proceedings are pending on the estate of a certain person, which estate is heavily indebted to said Bank.

A representative of the Federal Deposit Insurance Corporation has been appointed liquidator of said Bank under authority of the Florida law. This same representative has been appointed trustee of the bankrupt estate, and as such trustee has \$50,000.00 more or less of the funds of said bankrupt estate on deposit in the First Bank of Marianna, a bank organized under the laws of the State of Florida.

Does the First Bank of Marianna have the power and authority to pledge its assets as security for deposit of funds held by said trustee in bankruptcy and is such pledge of assets valid?

*To Honorable J. M. Lee, State Comptroller:*

It is my opinion that the funds in question, notwithstanding the fact that they are held for the account of a trustee in bankruptcy, are nevertheless within the meaning of the law "private funds" and are not "public funds."

It is further my opinion that the attempt on the part of the First Bank of Marianna to pledge its assets as security for such deposited funds held by said trustee in bankruptcy is ultra vires and invalid.

The following is a list of cases that form the basis of the opinion that the proposed deposit is ultra vires and invalid: *Vassar v. Smith* 183 So. 705. The statute referred to in the opinion in the foregoing case is identical with Section 653.10, Florida Statutes, 1941; *Florida National Bank of Jacksonville et al v. Okeechobee County, et al*, 157 So. 570; *Cottondale State Bank v. Oskamp Nolting Company* 59 So. 566.

Upon the basis of the foregoing decisions it would appear that the attempted security for the deposit in this transaction is ultra vires and void unless the funds deposited are public funds, which the decision in *Vassar v. Smith* indicates is not the fact.

The following cases seem to cast further doubt upon the public character of the fund in question: *Phelps v. Citizens Union National Bank* 13 Fed. Suppl. 623 (This case involved bankruptcy funds); *Smyer v. United States* 71 L. Ed. 667; *People v. Showalter* 14 P. (2) 1034; *Leonard v. Gage* 94 Fed. (2) 19; *Eckerson v. Utter* 7 Fed. Suppl. 201; *Cummings v. Smith* 13 N. E. (2) 69; *State v. Olson* 175 N. W. 714; *Kiernan v. Cleland* 273 P. 938; *U. S. F. & G. Co. v. State* 188 So. 911; *Allen v. City of Omaha* 286 N. W. 916; *Beckner v. Com.* 5 S. E. (2) 525; *F. D. I. C. v. Tremaine* 37 Fed. Suppl. 177.



## TRUST COMPANIES

August 1, 1944.—044-220.

## DEPOSITED SECURITIES—EXTENSION OF MATURITY

QUESTION:—A certain Title and Trust Company heretofore assigned to the State Treasurer as a part of its deposit of securities under Section 655.10, Florida Statutes, 1941, a note and mortgage executed to such trust company by two persons, "A" and "B." Now that "A" has died, may the State Treasurer accept an agreement executed by "B" and the surviving heirs of "A" extending payment of the balance of such note (\$8,800.00 due June 1, 1944) for a period of five years from such maturity date, in partial payments, the last payment due June 1, 1949, without impairing the purpose for which such original note and mortgage were assigned?

*To Honorable J. Edwin Larson, State Treasurer:*

It appears that "A" died intestate on July 31, 1942, leaving as his sole surviving heirs at law his widow, and his daughter, an only child. The agreement is signed by the widow, the daughter, the daughter's husband, "B" and "B"'s wife. Under the extension agreement the \$8,800.00 is payable \$550.00 on June 1, 1945, \$550.00 on June 1 of each year thereafter to and including June 1, 1948, and \$6,600 on June 1, 1949, together with interest until maturity, computed at the rate of five per cent per annum on so much of the principal of said sum as shall from time to time remain unpaid, such interest being payable quarter-annually on the first days of September, December, March and June of each year during the life of said agreement.

It is assumed that the recitations of fact in the extension agreement are true. However, since the agreement is not self-proving as to these facts, it is required that you obtain from the trust company an affidavit or affidavits evidencing to your satisfaction that "A" died intestate on July 31, 1942, leaving as his sole and only heirs at law his widow and his daughter, and further that the widow has not married again since the death of her husband, "A."

In my opinion, the acceptance of the extension agreement will not impair the security of the mortgage. It is noted that while the extension agreement contains a promise on the part of the signers thereof to pay the \$8,800.00 in the installment payments therein provided, the agreement also contains the provision that the signers thereof will perform, comply with and abide by all of the stipulations, covenants and agreements contained in said original mortgage and note except as modified by the extension agreement.

It is recognized that the acceptance of the extension agreement to the extent of its provisions changes the terms of the security as it was deposited with you. While strictly speaking the acceptance of the extension agreement may not constitute a substitution of a security as contemplated by Section 655.10, Florida Statutes, 1941, I recommend that the original note and mortgage, together with the extension agreement, be treated as a substitute security, and the value thereof be determined by the Comptroller, Treasurer and Attorney General as provided by said Section 655.10. As a source of information for such valuation, it is suggested that you have someone from your office or some other person familiar with the property described in the mortgage furnish an estimate of its value.

Since the note and mortgage at the time of the execution of the extension agreement were held by you as assignee, your consent thereto is required as between you and all parties thereto, but such consent will be met, in my opinion, by your official receipt therefor to the trust company.

December 4, 1944.—044-338.

STATE TREASURER—DEPOSIT OF TRUST COMPANIES

**QUESTION:** When a trust company (capitalized at \$100,000) incorporated under Sections 6124, 6145, C.G.L. (now Chapter 655, Florida Statutes, 1941) provided in its charter for exercise of the powers, including title insurance, granted in Paragraph 14, Section 6126, C. G. L., and such company has at this time on deposit with the State Treasurer securities of the value of \$36,000, such excess over \$25,000 at least to the extent of \$10,000 having been made as required by said Paragraph 14, now that said Paragraph 14 has been repealed (by Chapter 13576, Acts of 1929), should such deposit in excess of \$25,000 market value be considered as excess deposits under Section 655.10, Florida Statutes, 1941, or should such excess be considered as deposit required by said Paragraph 14, Section 6126, C.G.L.?

*To Honorable J. Edwin Larson, State Treasurer:*

Letters patent of the trust company in question issued on April 5, 1928. In 1934 its charter was amended with respect to name only. Among other powers of the trust company provided in the charter are power and authority to carry on the business of a safe-deposit company, to examine, make and certify abstracts of title, and to make insurance of every kind pertaining to or connected with titles to real estate, as authorized by said Paragraph 14, provided the corporation should fully comply with said law with respect to deposit with the State Treasurer. The powers above mentioned were granted by Paragraph 14, Section 6126, C. G. L. (Section 4185, R.G.S.) which provided that to exercise such powers they were required to be enumerated in the charter, and which provided further, that in order to exercise such powers an additional deposit of \$10,000 with the Treasurer was required.

Your letter, and the above question framed on information contained therein, presupposes the deposit above \$25,000 is occasioned by the requirements of Paragraph 14, Section 6126, C. G. L. The Treasurer's present outstanding receipt to the trust company is a formal one and makes no mention of the purpose or purposes of the deposit. While the records in the Treasurer's office fail to disclose positively that the excess above \$25,000 (or any part of such deposit) is intended to meet the requirements of said Paragraph 14, Section 6126, C.G.L., it is assumed that is the reason for at least \$10,000 of such excess.

The fact that said Paragraph 14, Section 6126 C.G.L., was dropped from the law by Chapter 13576, Acts of 1929, does not appear to have impaired the right of the trust company to exercise such powers based thereon and enumerated in its charter, unless such repeal may be considered reasonable exercise of police power, which is most doubtful. It would appear that the fact that such powers were granted did not of itself require the excess deposit of \$10,000 unless such powers, or any of them, were exercised by the company.

In my opinion the above question is properly answered as follows:

1. If the trust company has abandoned the exercise of the powers based upon Paragraph 14, Section 6126, C.G.L., and has no outstanding contracts, agreements, policies or other instruments executed by it in connection with the exercise of such powers heretofore, the excess of said deposit above the market value of \$25,000 is excess deposit.
2. If the company has not abandoned the exercise of such powers, or having abandoned them after having heretofore exercised all or any of such powers and has outstanding any contracts, agreements, policies or other instruments executed by it in connection therewith, \$10,000 of such excess is the deposit required by Paragraph 14, Section 6126, C.G.L.

## CHAPTER XXXI

### COMMERCIAL RELATIONS

#### NEGOTIABLE INSTRUMENTS

February 10, 1944.—044-47.

##### EXCHANGE ON CHECKS—TAX COLLECTORS

**QUESTION:** Should a Tax Collector assume payment for the exchange on checks given him by taxpayers?

*To Honorable A. Alberson, Tax Collector, Chipley, Florida:*

I wish to advise that usually the bank charges the exchange against the account of the payee rather than the payor. In instances where this is not done and where the company won't pay the exchange I know of no reason why you should accept a check without the exchange added to same. I take it that these payments are for taxes and the law contemplates that the tax should be paid in full in cash. If you accept a check, you do it as an accommodation rather than as a duty, and I think you would be well within your rights in refusing to accept any check in payment of taxes or any other official payment made to your office that did not fully cover the tax or other item plus any costs that you might incur in reducing this payment to cash.

#### LEGAL HOLIDAYS

September 22, 1943.—043-253.

##### DESIGNATION OF THANKSGIVING DAY

**QUESTION:** What is the Governor's authority or nonauthority in designating, insofar as the State of Florida is concerned, the Thursday on which Thanksgiving is to be observed in the five Thursday month of November 1944?

*To Honorable Spessard L. Holland, Governor:*

Section 683.01, Florida Statutes, 1941, has specifically removed from the realm of speculation what day Thanksgiving shall be observed in the State of Florida. I quote the pertinent part thereof:

**"Legal Holidays Designated.**—The legal holidays are . . . the last Thursday in November, Thanksgiving Day."

I therefore must advise that you have no authority whatsoever in designating, insofar as the State of Florida is concerned, the Thursday in November, 1944, on which Thanksgiving is to be observed other than that fixed by law.

## CHAPTER XXXII

### REAL AND PERSONAL PROPERTY

#### MARRIED WOMEN'S PROPERTY

December 20, 1943.—043-335.

#### JOINDER BY HUSBAND OR WIFE IN LEASE

QUESTION: 1. Is a lease by the husband of his interest in realty a conveyance of real property requiring the wife to join as a party to release her dower interest?

2. In a lease of real property owned by the husband, if the wife must join for the purpose of releasing her dower, is her acknowledgment required?

3. Can a married woman lease her real property without the consent and joinder of her husband?

4. Are the acknowledgments of the husband or wife required where real property of the wife is leased?

*To Major John E. Holliman, Division Engineer, Atlanta, Georgia:*

In answering questions 1 and 2, I beg to advise that it is immaterial whether or not a lease of real property is considered a "conveyance of real property" as the wife has an inchoate right of dower in the real property of the husband owned by him during his life and not released by her as required by Section 693.02, Florida Statutes, 1941. A lease of real estate (except homestead) would be effective without joinder of the wife as long as the right of dower in the wife remained inchoate (see *Neal vs. McMullian*, 124 So. 29), but on the death of the husband she may elect under Section 731.34, Florida Statutes, 1941, to take dower, which interest would be an undivided one-third interest in fee simple of the real estate owned by her husband at the time of his death, that she had not released.

Section 293.03, Florida Statutes, 1941, formerly provided that for relinquishment of dower to be effective, the instrument releasing dower should be acknowledged in a certain manner and form therein set out. Cases construing this statute universally required instruments to be acknowledged (see *Hutchinson vs. Stone*, 84 So. 151). This section has been repealed by Chapter 21746, Laws of Florida, 1943, which no longer requires the acknowledgment to make the relinquishment effective, but requires the acknowledgment to entitle the instrument to record.

It is my opinion that a lease by the husband alone of real estate, other than the homestead, owned by him, is effective to lease the real estate, but it is subject to the inchoate right of dower of the wife that arises on the death of the husband. It is also my opinion that an acknowledgment by the husband or wife executing such a lease is necessary only for recording purposes.

"Homestead Property" is the property defined as homestead by Article X, Section 1, of the Constitution of Florida. Such property by the provision of such section "shall not be alienable without the joint consent of husband and wife." (Emphasis supplied). This involves a construction of the word "alienable."



In the case of *Norton vs. Baya, et al.*, 102 So. 361, following *Hutchinson vs. Stone, supra*, it was said in effect:

To "alienate" homestead real estate as contemplated by the Constitution, means to convey or transfer the legal title or the **beneficial interest** owned or held therein.

Also in *Maillot vs. Turner*, 121 N. W. 804, 157 Mich. 167, it was directly held:

"A lease of a homestead is an 'alienation' within the Constitution."

Also in *Coughlin vs. Coughlin*, 26 Kan. 116:

"The Kansas Constitution providing that a homestead shall not be alienated without joint consent of husband and wife, prohibits husband from executing 5 year lease without consent of wife."

It is therefore my opinion that a lease of a homestead is void unless executed by husband and wife. However, in the light of Chapter 21746, *supra*, there is no necessity that the lease be acknowledged except to entitle instrument to record.

To answer the third question it is necessary to construe Chapter 21932, Laws of Florida, 1943. Section 1 of this Act provides:

"Every married woman is hereby empowered to . . . sell, convey, transfer, mortgage, use, and pledge her property, real and personal, and to make, execute and deliver instruments and documents of every character without restraint without the joinder or consent of her husband, in all respects, as fully as if she were unmarried. . . . Provided, however, that no deed or mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without joinder of her husband; . . ."

The first portion of the Act is limited by the proviso and it becomes necessary to determine whether or not a lease falls within the terms thereof requiring the joinder of the husband. We may limit the inquiry to whether or not a lease of real estate is an "instrument conveying or encumbering real estate."

The texts generally hold that a lease of real property for years is a "Chattel Real" and is considered personal property. (42 American Jurisprudence, Real Property # 25). We have one case in Florida holding that a lease of real estate for 5 years is a "Chattel Real." (*Matthews vs. McCain*, 170 So. 323). However, it is generally held that a lease of timber or turpentine rights and other interests whereby part of the "real estate" itself is taken from the land, is considered a sale of an interest in the land. (32 American Jurisprudence, Landlord and Tenant # 16; also *Gibson vs. Longino*, 149 So. 592, and *Roux vs. Houk*, 133 So. 853).

It is generally held that a lease of real estate (other than timber, etc. interests as above stated) is deemed personal property and that statutes providing for the manner of conveying real estate, including within its operation "leasehold" interests, does not render a leasehold "real estate." (32 A. J. Landlord and Tenant # 17; *Orchard vs. Wright-Dalton-Bell-Anchor Store Company, et al.*, 20 American Annotated Cases 1072, 225 Mo. 414; 125 S. W. 486.)

However, this is not the rule in Florida. Section 689.01, Florida Statutes 1941 (5662 C.G.L. 1927; Section 5, Chapter 20954, Laws of Florida, 1941), an act providing how real estate in Florida shall be conveyed, has the effect of rendering a lease for years subject to such act, a "conveyance of an interest in land." (*Campbell vs. McLaurin Investment Com-*

pany, 77 So. 277, followed by *Flowers vs. Atlantic Coast Line Ry. Co.*, 192 So. 321). Section 689.01 now provides for "term of more than one year or any uncertain interest," having formerly provided for two years.

With this change in mind it is my opinion that any lease of lands in this state for an uncertain term or for more than one year is a conveyance of an interest in lands falling within the proviso in Section 1, Chapter 21932, Laws of Florida, 1943, and a lease of real estate of a married woman for such term, to be valid, requires the execution by husband and wife.

In answer to question four, it is my opinion that a lease is not required to be acknowledged by husband or wife to render it valid. The execution is only a prerequisite for record.

I trust the above will answer your inquiry.

## CHAPTER XXXIII

### ESTATES OF DECEDENTS

#### FLORIDA PROBATE LAW

July 24, 1943.—043-180.

#### INSANE MURDERER—SHARE IN MURDERED MAN'S ESTATE

**QUESTION:** Would a son's share of the estate of his father be forfeited in the event the son was adjudged insane, such insanity existing at the time he committed the murder of his father?

*To Honorable Ralph Davis, Secretary, Board of Commissioners of State Institutions:*

In view of the fact that our legislative enactment (Section 731.31, Florida Statutes, 1941) only excludes from inheritance those who have been convicted of the murder of a decedent, and since the son could not be convicted of the murder of his father if the son was insane at the time of the killing of his father, it would appear that the son's share of his father's estate would not be forfeited. *Peeples v. Corbett*, 157 So. 510 (Fla.); *Bishop v. State*, 52 So. 21 (Fla.).

## CHAPTER XXXIV

### DOMESTIC RELATIONS

#### HUSBAND AND WIFE

February 3, 1944.—044-41.

##### COMMON LAW MARRIAGE—LICENSE PROCURED AFTER

**QUESTION:** If two persons with the intention of having a ceremonial marriage performed should have the ceremony performed without a license, what kind of a marriage is it? Can they by subsequently obtaining a license make the marriage a legal ceremonial marriage?

*To Dr. Henry Hanson, State Health Officer, Jacksonville, Florida:*

As to the first question, the answer is that the kind of marriage effected, if any, is a common law marriage, no marriage license having been obtained, provided the parties expressed their present agreement by parol to marry as a part of the actual ceremony. The Supreme Court of Florida in the cases of *Orr vs. State*, 129 Fla. 398, 176 So. 510, and *Thompson vs. Harris*, 148 Fla. 329, 4 So. (2d) 385, held that in a "common law marriage" the parties may express their agreement by parol or enter into such a ceremony as may satisfy their tastes since it is the agreement reached that makes the marriage contract.

As to the second question, the answer is that the mere procurement of the marriage license by the parties subsequent to their common law marriage does not in itself automatically render such common law marriage a ceremonial marriage perfected with a marriage license. To change the status of the marriage from a common law marriage to a ceremonial marriage with a marriage license, it would be necessary for the parties to have their marriage solemnized by an ordained minister of the gospel, or by some judicial officer or notary public, as provided by Section 741.07, Florida Statutes, 1941.

March 8, 1944.—044-81.

##### COUNTY JUDGE—DISCRETION IN ISSUING MARRIAGE LICENSE

**QUESTION:** Has the County Judge any discretion under Section 741.06, Florida Statutes, 1941, in issuing marriage licenses where the man who applies for same is over the age of 18 years, but less than 21, and the woman is over the age of 16 years, but less than 21, and where the applicants acknowledge under oath that they are the parents or expectant parents of a child?

*To Honorable Raymond R. Lord, County Judge, Monroe County, Key West, Florida:*

I have most carefully studied this entire section in order to try to arrive at the intention of the Legislature. The letter from the naval authorities states that in some instances it is impossible for members of their personnel to procure the consent of their parents in time to secure a marriage license because of the time element, as frequently a man is transferred or leaves the Key West Base without much notice; and that if the male is under the age of 18 and the female is under the age of 16 that they can procure a marriage license under Section 741.06 if they make an



affidavit stating that they are the parents or expectant parents of a child, whereas if the male is over the age of 18 but not 21 and if the female is over the age of 16 but not 21, they cannot procure this marriage license under the strict language of the statute without procuring their parent's consent. They seem to think that this is a rather harsh view to take of this section.

In attempting to construe a statute our Supreme Court has repeatedly held that:

"No literal interpretation should be given statute leading to unreasonable or ridiculous conclusion or purpose not designed by legislators." *State v. Sullivan*, 116 So. 255.

Our Court has also said with reference to this question:

"There is strong presumption against absurdity in statutory provision, and, if language used is susceptible of two senses, sense not leading to absurd consequences will be adopted by court." *Ha-worth v. Chapman*, 152 So. 663.

With these principles in mind I construe Section 741.06 to mean that where the male applicant is over the age of 18 and the female is over the age of 16, such license may issue without the consent of their parents, provided that the applicants acknowledge under oath that they are the parents or expectant parents of a child; otherwise a man from the age of 18 to 21 and a girl from the age of 16 to 21 would be barred from receiving a marriage license under the provisions of this section. I think that such a construction would be an absurdity and certainly not within the contemplation of the Legislature. However, since it has been said that some women have contracted marriages with members of the armed services for the purpose of securing their allotments and maybe their insurance, I believe that when an application for a marriage license is made by a male person who is in the armed services that it would be well for you to require such person to furnish you with a letter from such person's commanding officer that there is no objection on his part to such marriage. However, since the statute places in you a discretion to issue or not to issue a marriage license, I think it would be proper for you to issue a marriage license regardless of such certificate being furnished if you feel that the circumstances justify it.

June 20, 1944.—044-186.

#### PROXY MARRIAGES BY MAIL

QUESTION: Are proxy marriages by mail valid?

*To the Bureau of Vital Statistics, Jacksonville, Florida:*

It appears that a certain young lady whose fiance is in the armed services in the Pacific wishes to procure a marriage license, send it to the fiance, with any other papers which may be necessary, and, upon the return of said papers, to go through a formal ceremony before a minister, in the presence of witnesses, with someone acting as said fiance's proxy. After the aforementioned ceremony, she plans to have the minister write to the young man, propounding the usual questions, which the said young man is to answer, sign in the presence of witnesses, and return, after which she believes they may legally be pronounced man and wife.

In my opinion this would not be a valid marriage.

The question requires a consideration of the statutes and the requirements of common law marriages. By a long line of decisions common law marriages are recognized as valid in the State of Florida. The requirements of a common law marriage in this state have been set out in numerous decisions of the Supreme Court:

"To constitute marriage per verba de praesenti the parties must be in the presence of each other when the agreement is entered

into . . . " *Mariscano vs. Marsicano*, 84 So. 156; *Orr vs. State*, 176 So. 510; 18 R.C.L. 391.

"To constitute a valid marriage per verba de praesenti there must be an agreement to become husband and wife immediately from the time when the mutual consent is given . . ." *Marsicano vs. Marsicano*, 84 So. 156; *Chaves v. Chaves*, 84 So. 672; *Garcia et al. v. Exchange National Bank of Tampa*, 167 So. 518; 18 R.C.L. 392.

"An express future condition is absolutely fatal to a claim of marriage, and cannot be explained away by circumstances. It shows mental reservations which are incompatible with consent. This is true whether the condition relates to the creation of the marriage status or to the duration of the relations of the parties. As there can be no contract per verba de praesenti where the marital status is to become fixed in the future, it is not sufficient to agree to present cohabitation and a future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed." *Mariscano v. Marsicano*, 84 So. 156, 18 R.C.L. 392.

It will be observed, therefore, that to be a valid common law marriage; (1) the consent must be given by the man and woman in the presence of each other; and (2) there must be an agreement that the relationship or status of husband and wife is to begin immediately upon giving the consent.

The statutory requirements are merely directory. *Mariscano v. Mariscano*, 84 So. 156. They do not dispense with any of the requisites of a valid common law marriage. All things necessary for a common law marriage must be present in a marriage had with benefit of license, witnesses and clergy. The ceremonial marriage merely solemnizes or gives a formal setting to the transaction. The act of pronouncing the couple man and wife by the minister or other official is only a part of the ceremony. It is no part of the essence of the marriage. Under the usual ceremonial marriage when both have said "I do," or words of similar import, they are husband and wife. The great importance of license, witnesses, official or clergyman in a ceremonial marriage on the one hand, and the cohabitation, repute, habit, etc., in common law marriages on the other hand, relate only to proof of the marriage. Strictly speaking, whether it be a ceremonial or a common law marriage, it is complete when a man and woman having the required capacity, consent or agree at the same time, in the presence of each other, to be husband and wife from that moment.

I rendered an opinion some time ago on the validity of a trans-Pacific radio-telephone marriage. In that case the ceremony was performed in the state where the license was issued. The girl, the minister and witnesses were in the conference room of the telephone company where more than one phone was available. The sailor and chaplain were in the Hawaiian area, the chaplain acting merely as a witness for the proper identification of the boy. The customary questions were asked by the minister and answers given by the boy and girl, all within the hearing of all parties. Under that plan the status of husband and wife began immediately upon the consent being given. Considering that such arrangement was a sufficient compliance with the law as to the parties being in the presence of each other, I held that such a marriage would be valid under the law, if performed in this state.

Under the plan outlined first above, the parties are not in the presence of each other nor would it be possible to immediately create the relationship upon the giving of the mutual consent because the consent of both parties under the proposed plan could not be given at the same time.

It is, therefore, my opinion that in the absence of a legislative act no such marriage performed in the manner outlined by the young lady would be valid under the laws of this state.

## CHAPTER XXXV

### CRIMES

#### GAMBLING

August 10, 1944.—044-235.

##### CONFISCATION OF SLOT MACHINES

**QUESTION:** What disposition should be made of illegal slot machines seized by the Sheriff where the defendant charged with the maintenance and operation thereof failed to appear for trial, and his appearance bond was estreated, but he has never been convicted?

*To Honorable Mercer P. Spear, County Attorney, Panama City, Florida:*

Under the provisions of Section 849.19, Florida Statutes, 1941, property rights in slot machines as defined by Section 849.16 are declared not to exist in any person. Section 849.18 provides for the disposition of such slot machines after conviction, but I find no provision of law for disposition of slot machines before conviction.

In view of the fact that property rights in illegal slot machines do not exist, the defendant apparently has no right to any such slot machine which has been seized by an officer, whether he has been convicted or not.

It therefore appears to me that the officer seizing this machine should hold possession of same until the case against the defendant is finally disposed of, unless otherwise directed by appropriate court order. The mere estreating of an appearance bond does not finally dispose of and terminate a criminal case. When the defendant fails to appear for trial and his bond is estreated, a capias should be issued and the defendant brought before the Court for trial. If the defendant is available to receive an illegal slot machine seized by the Sheriff, he would be likewise available for trial on the charge arising by reason thereof.

July 25, 1944.—044-213.

##### RACE HORSE MACHINES

**QUESTION:** Is the possession of a race horse machine unlawful when said machine does not pay off and is marked "For Amusement Only"?

*To Honorable C. M. Hand, Sheriff, Seminole County, Sanford, Florida:*

Unlawful slot machines are defined by Section 849.16, Florida Statutes, 1941, and the possession of such machines is made unlawful by Section 849.15, Florida Statutes, 1941.

Whether or not the possession of a slot machine is unlawful depends upon whether or not the slot machine itself is an unlawful slot machine or is used for the purpose of gambling.

I am, therefore, of the opinion that if a slot machine is such a machine that the player may receive or become entitled to receive any piece of money, credit, allowance, thing of value or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or other thing of value, or which may

be given in trade, or if the machine pays off with free additional chances, that its possession is unlawful under the laws of this state. The possession of a slot machine is also unlawful under the laws of this state if such slot machine is used for gambling purposes, regardless of the type of such machine or whether or not it pays off in money, free chances or anything else.

#### SUNDAY LAWS

November 8, 1943.—043-304.

##### FIREARMS—SUNDAY USE

QUESTION: Is it illegal to hunt on Sunday?

*To Honorable T. E. Duncan, State Attorney, Gainesville, Florida:*

Section 855.04, Florida Statutes, 1941, prohibits the use of firearms to hunt game or to fire at targets on Sunday.

Section 30, Article IV, of the Constitution of the State of Florida, effective January 1943, provides for creation of the Game and Fresh Water Fish Commission, with wide powers, including powers of management, restoration, conservation and regulation of game, and further providing for repeal of all laws in conflict therewith.

Section 855.04, is distinctly a "Sunday Law" and emanates from a different philosophy from that expressed in the Constitutional Amendment. It is quite true that the Constitutional Amendment undertook to repeal all laws inconsistent therewith, but said Amendment and Section 855.04 deal with entirely different subjects and there is no express intention of the Amendment to repeal such section. See *Harrison vs. McLeod*, 194 So. 247.

It is therefore my opinion that Section 855.04, Florida Statutes, 1941, was not repealed by the adoption of the above mentioned Constitutional Amendment and prohibits the hunting of game or firing at targets on Sunday.

September 16, 1944.—044-273.

##### HUNTING WITH FIREARMS

QUESTION: If a regulation of the Game and Fresh Water Fish Commission permits hunting every day in the 1944-45 general hunting season, is it permissible to hunt with firearms on Sunday during such season?

*To Dr. I. N. Kennedy, Director, Game and Fresh Water Fish Commission:*

Section 855.04, Florida Statutes, 1941, provides that:

"Whoever uses firearms by hunting game . . . upon Sunday shall be punished by imprisonment . . . or by fine . . ."

In view of the construction placed upon the aforesaid statute by the Supreme Court of Florida in *Harrison v. McLeod*, 194 So. 247, it is my opinion that your question must be answered in the negative.

##### DRUNKENNESS; VAGRANCY; DESERTION

April 6, 1944.—044-116.

##### REFUSAL TO PROVIDE FOR CHILD

QUESTION: A married woman who is insane gave birth to a child shortly after being admitted to the Florida State Hospital. The woman's husband, the father of the child, refuses to make any provision for the



care of the child and refuses to consent to an adoption placement. What is the legal responsibility of the father for the child? What means has the State for enforcing such responsibility, and what steps should be taken to make proper provision for the child?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital:*

Section 856.04, Florida Statutes, 1941, makes it a felony for a man to withhold from his children the means of support. The Supreme Court of Florida in construing this section has held that it presupposes existence or ability of the father to obtain means of support and the needs of his children for support. *McBrayer v. State*, 112 Fla. 415, 150 So. 736. If, therefore, you deem it advisable you could submit this matter to the State Attorney of Duval County and request him to investigate and determine if prosecution is warranted by the facts.

Under Sections 45.02 and 65.10, Florida Statutes, 1941, a bill in equity could be brought by the insane mother of the child by her guardian against her husband to obtain contribution or maintenance for the support of the child. Such a decree would be awarded, however, only in case it was proved the husband had the ability or means to provide contribution or maintenance.

It appears that the matter of providing for the child has already been brought to the attention of representatives of the State Welfare Board. The State Welfare Board is required by law to provide for dependent children out of available funds provided for that purpose. However, whether the child in question is dependent and whether funds are available for its care is a matter within the determination of the State Welfare Board.

It is true that the father cannot be required to consent to an adoption placement.

### FICTITIOUS NAME STATUTE

November 10, 1943.—043-297.

### REGISTRATION—CANCELLATION

**QUESTION:** A certain person has registered the name of **The Associated Press** as his trade-mark, and in his application it is represented that "the class of merchandise upon which the same has been used is printed matter."

1. Did this person have the right to register the trade name **The Associated Press** when, in fact, he does not represent the generally-known organization which sends out all of its news dispatches under the name of **The Associated Press**?

2. If it was an improper registration, will the Secretary of State have the right to cancel the same and refund the fee paid therefor?

*To Honorable R. A. Gray, Secretary of State:*

The application for registration of the purported trademark, and the registration of the same, was made under the provisions of Sections 506.06 and 506.07, Florida Statutes, 1941. Section 506.06 in part provides:

"When any person or any association or union of working men adopts or uses and files as provided in §506.07 any label, trade-mark, terms, wording, design, device, color or form of advertisement for the purpose of designating, making known or distinguishing any goods, wares, merchandise or other products of labor as having been made, manufactured, produced, prepared, packed or put on sale by such person or association or union of working men, or by a mem-

ber or members of such association or union, it shall be unlawful," for any person to counterfeit, imitate, or knowingly to use, sell or offer for sale such label, trade-mark, term, wording, design, etc.

Section 506.07 in part provides:

"Every person, association or union that adopts or uses a label, trade-mark, term, wording, design, device, color or form of advertisement as provided in §506.06, may file the same for record in the office of the secretary of state, . . ."

by following the required procedure.

In answer to the questions above posed, it is my opinion that the provisions of the statutes comprehend the registration by an individual of any trade-mark, term or wording that he may lawfully use, and that is used by him for the purpose of designating or distinguishing his goods, wares, merchandise or other products of labor as having been made, manufactured, produced, prepared, packed or put on sale by such person.

Before a person may register a trade-mark or a trade name under the provisions of Section 506.07, the application filed by him for such purpose must contain the information required by said section. The application of the person in question sets forth that the class of merchandise upon which he claims the right to use the trade-mark **The Associated Press** is "printed matter." The term "printed matter" might cover anything from an ordinary handbill to a deluxe edition of the Encyclopedia Britannica. The section above designated required that the application set forth not only the class of the merchandise upon which the trade-mark or name is to be used, but also a description of such merchandise or goods. The application filed did not set forth a description of the goods or merchandise upon which the purported trade-mark or name has been used; therefore, such application did not conform to the requirements of the law and was not legally sufficient to authorize the registration of a trade-mark or name thereunder. The registration having been predicated upon an insufficient application, in my opinion you have the right to cancel the same and refund the fee paid therefor.

## CHAPTER XXXVI

### CRIMINAL PROCEDURE

#### ARRESTS

March 6, 1943.—043-65.

#### BAIL BONDS—FEES FOR APPROVAL

**QUESTION:** Who is entitled to collect the fees allowed by law for taking and approving bail bonds, where the defendant was arrested and placed in the county jail by a Constable, when the bond, set by a magistrate or court, was taken and approved and the bond form prepared, by the jailor, a duly qualified and bonded Deputy Sheriff?

*To Honorable Murray Sams, State Attorney, DeLand, Florida:*

Where Constables make arrests upon process issued by a magistrate or court, they have authority to take and approve bail bonds, in the amount fixed by the magistrate or court and entered on the process, so long as they have the actual custody of the defendant (Ex parte Hatcher, 86 Fla. 330, 98 So. 72), and on the same principle Constables would likewise seem to have authority to take and approve bail bonds, in the amount fixed by the magistrate or court, and entered on the process under which they are transmitting defendants to jail, so long as they have the actual custody of the defendant.

Where arrests are made without warrants Constables have no authority to fix bonds, but must carry the defendant before a magistrate without delay (Section 901.23, Florida Statutes, 1941), and where defendants are allowed bond for their appearance at a later date, for trial or preliminary hearing, such bond should be approved by the magistrate or court hearing the cause or by the Sheriff (Sections 903.34 and 937.04, Florida Statutes, 1941). After a defendant has been turned over to the jailor or placed in jail he is no longer in the custody of the Constable. Acts of Deputy Sheriffs, including the jailor, are in legal effect acts of the Sheriff.

I am of the opinion that, where a defendant is arrested and placed in the county jail, or turned over to the jailor, by a constable, and such defendant, while in jail or in custody of the jailor, makes bond, in the amount set by a magistrate or court, that such bond should be taken and approved by the Sheriff or one of his lawful deputies, including the jailor, and when so taken and approved the Sheriff is entitled to collect the fees allowed by law for the taking and approving of such bond. Where a Constable takes and approves a bond, under any circumstances where he may by law be authorized to take and approve bail bonds, he is the proper person to collect such fees.

March 2, 1943.—043-59.

#### JURISDICTION—CIVIL OR MILITARY

**QUESTION:** Are civil authorities required to release to military authorities members of the armed forces of the United States held in custody for violation of a civil law?

*To Honorable Chester B. McMullen, State Attorney, Clearwater, Florida:*

Articles 54-68, 75-96, Articles of War for the Army, set forth certain acts and violations which are declared to be violations of the Military Law. Under these Articles are included most of the crimes listed in the Criminal Codes of the several states, which a soldier might be able to commit.

Article 96 is general in its terms, and provides that, although not mentioned in the Articles of War, "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by general or special, or summary courts martial, according to the nature and degree of the offense, and punished at the discretion of such Court."

Article 23 of the Articles for Government of the Navy, provides that: "All offenses committed by persons belonging to the Navy while on shore, shall be punished in the same manner as if they had been committed at sea."

The 74th Article of War provides that, **except in time of war**, the military authorities shall, upon application duly made, deliver to the civil authorities any person subject to military law who is charged with violating the civil law.

In 6 C. J. S. 425, Section 38, the author says:

"In time of war all offenses committed by soldiers are cognizable by courts-martial or military commissions, and, if the civil courts in time of war try and punish such offenders, it is because they are permitted to do so as a matter of comity or expediency. However, military courts do not have exclusive jurisdiction, even in time of war, over offenses against state laws by persons in the military service. The articles of war do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state laws committed within the geographical limits of the United States and the District of Columbia by persons subject to military law, but in time of war the military authorities have the preference in the exercise of jurisdiction, and, if this preference is to be waived in favor of a civil court, the waiver must be by proper authority."

It appears to be the settled law of both Federal and State Courts that civil and military tribunals exercise concurrent jurisdiction over the soldiers and sailors in times of war; but that the military authorities have the preference in exercise of jurisdiction, which jurisdiction may be exercised to the exclusion of the civil courts if the military authorities so choose.

When a member of the armed forces has been arrested by civilian authorities for the commission of an offense against the civil law, the proper procedure to be followed would be:

(a) When the arrest has been made for the commission of some misdemeanor, the soldier or sailor should be immediately delivered up to the military or shore police in that community, together with evidence of the charges against him.

(b) When the arrest has been made for the commission of a felony and the nature of the offense is such that the State's Prosecuting Attorney desires the prosecution of the person in the State Court, contact should be immediately made with the commanding officer of the person arrested, and application duly made to such commanding officer for leave to prosecute the offender in the State Court. Such application would, of course, be accompanied with full details concerning the offense committed by the arrested person. Should the commanding officer decline to grant the application of the prosecuting attorney, the person arrested should be immediately delivered to the military authorities.



## PRELIMINARY HEARING

January 12, 1943.—043-22.

## ARREST WITHOUT WARRANT

QUESTION: 1. Where a person has been arrested without a warrant, charged with the commission of a crime which may be prosecuted upon an information filed by the prosecuting attorney of the court having jurisdiction of the offense charged, is it necessary that a preliminary examination be held before an information may be filed and the accused brought to trial thereunder?

2. Where an information is filed and the accused is already in custody, should a *capias* be issued?

3. If the answer to the preceding question is that no *capias* is necessary, and no warrant or commitment has previously been issued, under what writ or authority should the arresting officer hold the prisoner or take his bail?

*To Honorable Bryan Willis, State Auditor:*

In the absence of constitutional or statutory provisions requiring it, a preliminary examination and a commitment or binding over by a magistrate is not necessary before the filing of an information (31 C. J. 628, Section 139). It is also the general, if not the universal rule, in the absence of constitutional or statutory requirement, that no preliminary examination or commitment or binding over is necessary before the finding of an indictment by a grand jury (27 Am. Jur. 596, section 13; 31 C. J. 576, section 27). There is no such constitutional or statutory requirement in this state.

Under Section 907.01, Florida Statutes, 1941, no *capias* is required to be issued where the person named in the indictment or information is in custody, or at large on bail, for the offense charged. Since the only function of the *capias* in a criminal case is to enable the Court to acquire jurisdiction over the person of the accused, by bringing him before it to answer the charges made against him; where the accused has been lawfully arrested, without a warrant, and taken before the Court without unnecessary delay, or where the accused has voluntarily appeared to the charges or his presence is secured in some other lawful way, there is no necessity for a *capias* or warrant of arrest (22 C. J. 468, section 316).

As the second question has been answered in the negative, it becomes necessary that we consider and answer the third question. Under Section 907.01 Florida Statutes, 1941 aforesaid, the Judge of the Court, upon the filing of an indictment or information is required to "indicate the amount of bail, if the offense is bailable," which amount is required to be endorsed upon the *capias* if one is to be issued. Although the amount of the bail is required to be endorsed upon the *capias*, if one is issued, no method for the said indication of bail by the Judge is provided by the statutes; this being true, the better method would probably be to indicate the amount of the bail by an order, either contained in the minutes of the Court or by separate orders. No *capias* or warrant being required in order to hold the accused already in custody to trial, the logical and necessary conclusion follows that the Court has jurisdiction to make provision for holding said accused for trial by proper commitment or process other than a *capias* or warrant. The better practice would seem to be for the Court to indicate the amount of bail, if the offense is bailable, and provide for the commitment of the accused if bail is not promptly furnished. The Court might by the same order indicate the amount of bail and direct issuance of a commitment in case bail is not promptly furnished. The Clerk of the Court, pursuant to the order aforesaid, would issue said commitment, which would provide the Sheriff with process for the holding

of the accused and basis upon which proper sheriff's charges may be made. (See 22 C. J. 510, section 349.)

You are, therefore, advised, pursuant to the above mentioned authorities, that:

1. It is not necessary that a preliminary examination be held before an information may be filed; however where the accused is in custody an information must be filed promptly, otherwise a preliminary examination would be required in order to comply with constitutional requirements.

2. No *capias* should be issued upon an information filed when the accused is already in custody or at large on bail.

3. Where an information is filed against an accused already in custody the Court should forthwith, by proper order, indicate the amount of bail to be required and direct the issuance of a proper commitment in case bail is not promptly furnished. This commitment will provide the Sheriff with process for holding the accused and form a basis upon which proper sheriff's charges may be made.

April 7, 1943.—043-98.

#### STATE EMPLOYEES—WITNESS AND MILEAGE FEES

**QUESTION:** Certain undercover men for the Beverage Department appeared as witnesses in a criminal case in the Circuit Court of Manatee County and were paid \$2.00 per diem and 400 miles. As state employees are they entitled to this fee?

*To Honorable Iveson Lloyd, Clerk of the Circuit Court, Manatee County, Bradenton, Florida:*

Under Subparagraph (4) of Section 902.19, Florida Statutes, 1941, it is provided that no law enforcement officer is entitled to any witness fees or mileage when he is summoned to testify in any court sitting in the county in which he holds office, is employed, had been employed there, or has his residence. Otherwise, there is no limitation. You did not state whether any of the employees mentioned held office in that particular county or had his residence there. If any one of these conditions is applicable the fee and mileage would not be collectible.

#### INDICTMENT AND INFORMATION

November 23, 1944.—044-334.

#### SECOND OR SUBSEQUENT OFFENSES—HOW PROSECUTED

**QUESTION:** Has the Prosecuting Attorney of the County Court of DeSoto County, Florida, authority under Section 775.11, Florida Statutes, 1941, to file an information charging a person as a second or subsequent offender under the provisions of Sections 775.09 and 775.10, Florida Statutes, 1941?

*To Honorable M. A. Rosin, County Prosecuting Attorney, Arcadia, Florida:*

Sections 775.09-775.11, *supra*, were originally enacted as Chapter 12022, Acts of 1927. These sections provide for prosecution of second and subsequent felony offenders by information but not by indictment. At the time this law was enacted, prosecutions for felonies by information obtained only in the Criminal Court of Record, and such prosecutions were by indictment only in the Circuit Court. Subsequently, at the general election in 1934, Section 10, Declaration of Rights of the Florida Constitution was amended to provide for prosecution by information in the Circuit Courts. Under Section 18, Article V of the Florida Constitution, County Courts have trial jurisdiction of misdemeanors only.

It would appear by reason of the above that when Section 775.11 was enacted, the Legislature intended this Act to apply to Criminal Courts of Record, and that the term contained therein, "prosecuting attorney of the county," referred to the County Solicitor of that Court who is also designated as "prosecuting attorney" by Section 27 of Article V, Constitution of Florida.

It may be, however, that the Supreme Court of Florida would construe this law as being applicable to Circuit Courts, in view of the fact that criminal cases may now be prosecuted in such courts upon information. If such a construction is placed upon this law, it would of course be the duty of the State Attorney to file the information charging the second or subsequent offense. I am unable to find where the Supreme Court of Florida has ever passed upon the instant question.

In view of the fact that this Act is applicable to felonies only, and County Courts have no jurisdiction in felony cases, certainly the Prosecuting Attorney of a County Court would not be authorized to file an information under its provisions. I am therefore of the opinion that your question should be answered in the negative.

#### JUDGMENT AND SENTENCE

October 15, 1943.—043-293.

##### FINE—ENFORCEMENT OF JUDGMENT ON ABSENT DEFENDANT

**QUESTION:** From time to time an attorney for a defendant charged with misdemeanor who has been released on bond appears for the defendant and pleads guilty for him, the defendant not being present. This is done with the consent of the Court and in some instances the fine is not paid. What is the correct procedure to enforce the judgment of the Court in such cases?

*To Honorable Bryan Willis, State Auditor:*

I wish to advise that under Section 922.02, Florida Statutes, 1941, a situation of this kind is covered as follows:

"If the sentence imposes a fine with or without imprisonment execution may be issued thereon as on a judgment in a civil execution."

I might add that I think the practice of allowing a plea of guilty for an absent defendant is a bad one since this puts the Court in a position whereby it can only reach the defendant who has filed a plea of guilty by an execution the same as if it were a civil case. I therefore suggest that it be discontinued.

November 26, 1943.—043-317.

##### FINE—ENFORCEMENT OF JUDGMENT ON ABSENT DEFENDANT

**QUESTION:** Are methods of enforcement, other than the one mentioned in the opinion of the Attorney General of October 15, 1943 (page 499), available where a plea of guilty is entered by an attorney and a fine imposed, but not paid, such as the issuance of a commitment under Section 922.01, or, the forfeiture of the bond under Section 903.26, Florida Statutes, 1941?

*To Honorable Bryan Willis, State Auditor:*

In my opinion of October 15, 1943, I held that under Section 922.01, Florida Statutes, 1941, where the sentence imposes a fine, with or without imprisonment, an execution may be issued thereon as on a judgment in

a civil action; adding, however, that I thought the practice of allowing a plea of guilty by an absent defendant was a bad one, since it puts the Court in a position where it can only reach the defendant by an execution as in a civil case.

Sections 903.26 and 922.01, Florida Statutes, 1941, bearing upon the above question should be read in connection with this opinion.

I do not find where the Supreme Court of this state has directly passed upon the above question, in so many words. However, I do find, in the case of *Moore vs. Littlefield*, Sheriff, 14 So. 2d. 902, that the appellant was tried in a Justice of the Peace Court in Volusia County, Florida, and convicted of the offense of assault and battery and was sentenced to pay a fine or in default thereof to be confined in the County Jail of Volusia County, Florida, for six months. The fine and costs were not paid and a commitment was issued. However, the defendant escaped before he had served but a few days of the sentence and remained at large until more than six months after the date of the sentence. When apprehended he contended that, since his sentence was for a period of six months only, it had expired prior to his rearrest, and that he could not then be confined in the county jail pursuant to that sentence. The Supreme Court did not agree with this contention. Apparently the Court approved the commitment of a person who fails to pay his fine. I am, therefore, of the opinion, that in view of this decision and the further fact that there are alternative methods of procedure, where a fine was not paid after a plea of guilty, that all three of the methods prescribed by the various statutes are available.

### EXECUTION

September 2, 1944.—044-260.

#### DEATH WARRANT—EARLIEST DATE OF ISSUANCE

**QUESTION:** What is the earliest time that the Governor could issue death warrants for the three negroes convicted and sentenced to death in Gainesville on August 31st, taking into consideration the time allowed for motion for a new trial or in arrest of judgment, time for perfecting an appeal, and the necessary time which must elapse between the date the warrants are issued and the actual date of execution?

*To Honorable Spessard L. Holland, Governor:*

Section 924.09, Florida Statutes, 1941, allows the defendant ninety days within which to appeal after the judgment or sentence. Section 920.02 allows four days, or such further time as the Court will allow, not to exceed fifteen days, after the verdict or finding of the Court, within which to file motion for a new trial, which now includes matter which prior to the Criminal Procedure Act could be set up in a motion in arrest of judgment. A Sunday intervening, the four days would be extended to five days. While the signing of the death warrant within those periods would undoubtedly abbreviate the time allowed by the statutes for an appeal or motion, there is another statute, Section 922.06, which I think is controlling. In effect, that section says that nothing other than a stay by the Governor or the filing of an appeal by the defendant may suspend or stay the execution of the death sentence.

Section 922.09 prohibits the execution of the death sentence until the Sheriff has delivered to the Governor a certified copy of the whole record of the conviction and sentence which the statute requires the Clerk to prepare as soon as possible.

Strictly speaking, the statutes fix no time which must elapse between the date of the warrant and the date of actual execution. Section 922.11 requiring the sentenced defendant to be kept securely in or adjacent to



the permanent death chamber not less than five days prior to the week of execution, in my opinion, requires only that the week selected for execution be such week, beginning with Monday, as will permit the defendant to be kept in such place for the statutory five days. There is nothing in the statute requiring those five days to begin after the signing of the death warrant and all that the statute requires is that the prisoner be in or adjacent to such chamber for at least the five days prior to the week of execution.

Summarizing, it is my opinion that in issuing the death warrant under our statutes, the Governor may disregard the time allowed for motion for new trial and for appeal; he may issue the death warrant for a defendant sentenced to death as soon as he has received from the Sheriff a certified copy of the whole record of the conviction and sentence required by Section 922.09; and he may fix, as the week for the execution, any week beginning with a Monday provided the prisoner shall have been confined in or adjacent to the death chamber for the five days prior to the Monday of such week.

### APPEALS

November 22, 1944.—044-326.

#### TERM OF IMPRISONMENT—TIME OF BEGINNING

QUESTION: 1. Does the term of imprisonment of a person sentenced to the Florida State Prison begin to run from the date he is placed in the county jail under a commitment awaiting transfer to the State Prison?

2. Should a state prisoner be given credit for time served in the county jail after conviction, pending the determination of his appeal to an appellate court?

*To Honorable S. L. Walters, Chief Clerk, Prison Division,  
Department of Agriculture:*

The length of the term of imprisonment is fixed by the Court in the judgment and sentence. The place of imprisonment is fixed by law the State Prison, and therefore a sentence to the State Prison can be executed only by confinement in such prison. The period of imprisonment begins to run from the date the prisoner is received at the State Prison, and continues to run so long as he remains there, until the sentence imposed by the judgment is fully satisfied. Upon an appeal being taken, execution of sentence is stayed and suspended by law and the defendant kept in custody in the county jail. However, he may at his option serve his sentence in the State Prison during the pendency of the appeal. Sections 924.14, 924.21 and 924.22, Florida Statutes, 1941.

I am therefore of the opinion that both of these questions should be answered in the negative.

### SEARCH WARRANTS

November 29, 1944.—044-331.

#### AUTHORITY OF MUNICIPAL JUDGE TO ISSUE

QUESTION: Does the Municipal Judge of the City of Marianna, Florida, have authority by reason of any special law pertaining to such city or under the general law, to issue search warrants in connection with violations of the State Beverage Law to search places situated within the corporate limits of such city?

*To Honorable E. W. Scarborough, Director, State Beverage Department:*

An examination of the special laws relating to the aforesaid City of Marianna, such laws being the Charter of that City (Chapter 21368, Special Laws of Florida, 1941, as amended by Chapter 22384, Special Laws of Florida, 1943), reveals no provision expressed therein which could be construed as giving the Municipal Judge of such city the authority about which you inquire.

With respect to that part of your inquiry concerned with the general law, Section 933.01, Florida Statutes, 1941, defines the persons competent to issue search warrants and fails to designate Municipal Judges. In this regard the Supreme Court of Florida held in *Hart v. State*, 103 So. 633, that

"No officer other than those enumerated . . . has power to issue a search warrant, and any attempt to do so by any other person is . . . in violation of section 22 of the Declaration of Rights of the Constitution of Florida."

Based upon the foregoing, I am of the opinion that the question must be answered in the negative, and it is respectfully suggested that your Department should not request the Municipal Judge of the City of Marianna to issue any search warrants.

Returned herewith is your copy of the Charter of the City of Marianna.

#### COURTS OF COUNTY JUDGES AND JUSTICES OF THE PEACE

September 23, 1944.—044-295.

#### ARREST WITHOUT WARRANT—TRIAL WITHOUT ISSUANCE OF WARRANT

QUESTION: May a person lawfully arrested without a warrant be brought to trial and tried, in the County Judge's Court, without the issuance of a warrant?

*To Honorable John T. Rose, Jr., County Judge, Punta Gorda, Florida:*

On October 21, 1941 (1941-42 Biennial Report 29), this office rendered an opinion upon this same question where a person lawfully arrested without warrant by a State Highway Patrolman was turned over to the Sheriff under Section 321.05, Florida Statutes, 1941. In this opinion it was held that no warrant was necessary. I am without knowledge as to the holdings of our Circuit Judges upon this question; and as far as I am informed there is no immediate prospect of a test case upon this question in the Supreme Court.

In the opinion of October 21, 1941, this office held that,

When a State Patrol Officer duly makes an arrest without a warrant, it is not necessary for a warrant, to be sworn out inasmuch as the prisoner is in the custody of the law and there is no occasion for a further arrest pursuant to a warrant. The law stated in *Corpus Juris* that appears applicable to this situation is as follows:

"Although where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, since, being already in custody, there is no reason to issue a warrant for his apprehension, yet a written complaint or information against defendant setting out his offense is generally just as necessary in such a case as in any other." (16 C.J. Criminal Law, Section 495).

Under this rule it would seem necessary for the State Patrol Officer to make an affidavit or written complaint stating the charges against the person arrested.

It is not necessary for a warrant to be sworn out when the State Patrol Officer accepts a bond from the prisoner and delivers the bond instead of the prisoner.

In addition to what was said in the above quoted portion of the opinion of October 21, 1941, I wish to call your attention to certain provisions in Chapter 937, Florida Statutes, 1941. Complaint may be made to the County Judge or Justice of the Peace by affidavit (Section 937.02, Florida Statutes, 1941), and when the accused is brought before the County Judge or Justice of the Peace by warrant (Section 937.03, Florida Statutes, 1941), or otherwise, if no warrant has been issued, the charges made against him, as stated in the complaint by affidavit, or in the warrant, shall be distinctly read to him and he may plead thereto (Section 937.05, Florida Statutes, 1941). Section 937.05 permits trial upon the complaint by affidavit or upon the warrant if one be issued.

In the case of *State ex rel., Oliver vs. Moorehead, Sheriff*, 151 Fla. 845, 10 So. 2d 576, one Don Oliver "was convicted on a charge made in an affidavit filed against him" in the County Judge's Court of Marion County, Florida.

In the light of the above mentioned authorities I am of the opinion that the main purpose of a warrant is to acquire custody of the accused, and that where he is in custody no warrant is necessary; that where the Sheriff, or any other officer, lawfully takes the accused into custody without a warrant, that no warrant need be issued, although complaint by affidavit should be made by the officer; and that the accused may lawfully be held and lawfully tried upon the charge made in the affidavit. Commitment may be issued or bond required of the accused in like manner as where the accused is brought before the Judge pursuant to a warrant.

### COSTS AND FEES

January 31, 1944.—044-39.

#### BASTARDY PROCEEDINGS

**QUESTION:** Who should pay costs in bastardy proceedings, under Chapter 742, Florida Statutes, 1941, and is a deposit for costs required as provided by Section 939.16?

*To Honorable Bryan Willis, State Auditor:*

Section 939.16 is applicable only to criminal proceedings and a bastardy proceeding is what is known as a quasi criminal proceeding, and becomes a civil action when it reaches the Circuit Court. (*State v. Rowe*, 99 Fla. 128 So. 7).

When in the Justice of the Peace Court, the matter of costs is, I believe, ruled by Section 81.26, Florida Statutes, 1941. It is the practice to require a deposit for costs in lieu of the security described in the statute.

The practice in reference to costs in civil proceedings in the Circuit Court is to require a deposit in a fixed sum which covers all costs.

I have been unable to find any statute that varies from or affects the practices above outlined or authorizes the charging of costs to the county, although suggestions looking to this change have been mentioned by Circuit Judges when assembled in their convention.

### EXECUTIVE CLEMENCY

June 24, 1944.—044-188.

#### PARDON BOARD—AUTHORITY TO COMMUTE SENTENCES

**QUESTION:** Where the judgment and sentence in a criminal case imposes the punishment of imprisonment, is the State Pardon Board empowered to commute such punishment to a fine or fine and costs?

*To the State Board of Pardons:*

The power of the State Pardon Board to commute punishment is derived under Section 12, Article IV of the Constitution of the State of Florida, reading as follows:

"Section 12. The Governor, Secretary of State, Comptroller, Attorney General, and Commissioner of Agriculture, or a major part of them, of whom the Governor shall be one, may upon such conditions, and with such limitations and restrictions as they may deem proper . . . **commute punishment** . . . after conviction, in all cases except treason and impeachment subject to such regulations as may be prescribed by law relative to the manner of applying for pardons." (Emphasis supplied).

The term "commute punishment" in Section 12, Article IV of the Constitution, is unrestricted by any language denoting a limitation upon the power conferred thereby. I am unable to find any decision of the Supreme Court of Florida amplifying the meaning of this term by particularizing as to its applicability. In the case of *Ex Parte White*, 131 Fla. 83, 178 So. 876, the Supreme Court of Florida, in discussing this section of the Constitution, said:

"The quoted provision of the Constitution clothes the Board of Pardons with broad and wide discretion in . . . **commuting punishments**, . . . (Emphasis supplied).

I am also unable to find any direct authority bearing upon this specific question, or court decision from any jurisdiction relating thereto. Commutation of punishment has been defined by law as "substituting a lesser amount or lesser grade of punishment for a greater punishment, both of which are known to the law."

In this state we have three usual grades of punishment in criminal cases, i. e. (1) capital punishment, (2) imprisonment, and (3) fine or fine and costs.

I am advised that it has been for many years the practice of the State Pardon Board in exercising its constitutional power to commute punishment, to substitute imprisonment for capital punishment, and fine or fine and costs for imprisonment. I am also advised that this action of the Board has been in accordance with opinions of former Attorneys General. However, I am unable to find such opinions.

The authorities are practically unanimous in holding that the right to commute punishment includes the right to substitute punishment of imprisonment for capital punishment, although they are silent as to whether or not it includes the right to substitute a fine or fines and costs for imprisonment. The latter is analogous to the former, as both are the substitution of a different and lesser grade of punishment for a greater grade of punishment.

In view of the fact that the constitutional term "commute punishment" is unrestricted by any limitation, and that the Supreme Court of Florida has said that broad and wide discretion obtains thereunder, and taking into consideration the analogy of this question to the unanimity of authorities holding that imprisonment may be substituted for capital punishment, I am of the opinion that the State Pardon Board is empowered under Section 12, Article IV of the Constitution of the State of Florida, to commute punishment of imprisonment to punishment of a fine or fine and costs, but only in those criminal cases where punishment by fine or fine and costs could have been imposed by the trial court in the first instance. This is applicable to both imprisonment in the County Jail and State Prison.



In view of the absence of direct legal authority on this question, I mention that it is a matter affecting the constitutional powers and duties of the Governor, upon which he may require an advisory opinion from the Supreme Court of Florida in the event that the State Pardon Board prefers to act with an abundance of caution.

### PARDONS

March 24, 1943.—043-85.

#### CONDITIONAL RELEASES; RESTORATION; SUPERVISION

**QUESTION:** 1. After the Pardon Board has granted a conditional release from prison with no set time for the expiration of the release period, has it the authority to issue an order setting up a time certain for the conclusion of the release period?

2. Has the Pardon Board the authority under the law, if such a new order can be entered, to designate the Parole Commission as the supervisory body?

3. Can the Pardon Board issue an order restoring to an individual, previously on parole, the right to vote and the other citizen rights taken away from him upon his being convicted of a felony without granting a full pardon in the case?

*To Honorable Francis R. Bridges, Jr., Chairman, Florida Parole Commission:*

1. The answer to this question, in my opinion, is in the affirmative. A conditional pardon, in case of a condition precedent, does not take effect, and, in case of a condition subsequent, becomes void, on violation or failure to perform the conditions thereof; *State v. Horne*, 52 Fla. 125, 42 So. 388; 7 L.R.A. (N.S.) 719; *Alvarez v. State*, 50 Fla. 24, 39 So. 481. Under authority of Section 12, Article IV, Florida Constitution, the Pardon Board has the authority and right to issue an order setting a date when such conditions shall be released and terminated, which order will have the effect of granting a full pardon.

2. In my opinion the answer to this question is in the negative. The same is partly answered by the answer to the preceding question. The Pardon Board is also bound by the conditions of the pardon, and, on its being accepted by the prisoner, has no authority to impose a further condition or provision for supervision on terminating said conditions; *Alvarez v. State*, *supra*.

3. This question, in my opinion, should be answered in the affirmative. While civil rights are forfeited by law when one is convicted of a felony, on full pardon being granted it blots out existence of the guilt, removes all that is left of the consequences of a conviction including disability, and restores all of his civil rights; *Singleton v. State*, 38 Fla. 297, 21 So. 21. Thus, the restoration of civil rights follows as a consequence of the granting of a full pardon. Under the general rule that a pardon should be construed most strictly against the State and most liberally in favor of the person pardoned, it is my opinion that an order of the Pardon Board restoring civil rights to a prisoner must be considered as a full pardon. However, it is within the authority of the Pardon Board to issue an order restoring to an individual only the right to vote and other citizen rights, but the limited scope of such order should be specifically stated and clearly made to appear.

## CHAPTER XXXVII

### CORRECTIONAL SYSTEM

#### PAROLE

August 13, 1943.—043-205. See 043-85.

#### CIVIL RIGHTS—RESTORATION

**QUESTION:** Can the Pardon Board legally grant a partial or limited pardon by restoring only civil and political rights as distinguished from a full pardon which not only removes all disabilities resulting from conviction but blots out the crime committed as well?

*To Honorable Francis R. Bridges, Chairman, Florida Parole Commission:*

Section 12, Article IV, Florida Constitution, provides that the Pardon Board "... may upon such conditions, with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment and grant pardon after conviction in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons."

In *ex parte White* 131 Fla. 83, 178 So. 876, the Supreme Court of Florida, in construing said constitutional provision, said:

"The power and authority granted by the people to the Pardon Board as expressed, *supra*, is broad, general, and without limitation and may do what 'they may deem proper.'"

Under this construction of the constitutional powers of the Pardon Board it is my opinion that said Board can legally grant a partial or limited pardon with restoration of civil and political rights only. However, in view of the rule that any pardon is construed most strictly against the States and most liberally in favor of the person pardoned, any such pardon should be most specific that it is only partial or limited, and should specifically state to what it relates, covers and restores.

February 25, 1944.—044-63.

#### ELIGIBILITY FOR PAROLE—POWER OF COMMISSION

**QUESTION:** May a person who has been convicted in a Court of this State and sentenced to a term of years to run concurrently with a sentence imposed by a Federal Court, be paroled under State Law after serving a period of time in Federal Prison under such concurrent sentences, equal to the minimum requirement of the Florida Parole Law?

*To Honorable Joseph Y. Cheney, Chairman, Florida Parole Commission:*

The pertinent part of Section 947.16, Florida Statutes, 1941, as amended by Section 12, Chapter 21775, Acts of 1943, reads as follows:

**"Eligibility for parole; power of commission.**—Every person who has been, or who may hereafter be convicted of a felony or one who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences total twelve months or more and confined in a jail or prison in this State, in execution of the judgment of the Court thereof and who has served not less than six months of such term, and in cases where the term is eighteen months or less, has served not less than one-third of his term, and whose prison record

is good, shall be eligible for consideration by the Commission for parole." (Emphasis supplied).

Upon first thought it would appear that the language of Section 12 supra "and confined in a jail or prison in this State" answers the above question in the negative, and that such persons would not be eligible for parole. However, a full consideration of this question justifies further inquiry.

It is the undisputed intent and purpose of the Florida Parole Law to grant paroles to all persons whose conduct while in prison and past record justify parole, subject to certain limitations. The nature of the Florida Parole Law itself requires that it be given a liberal interpretation in order that its intent and purpose may be accomplished, and in placing a construction on any part thereof, the entire law together with any other applicable State Law should be considered in *pari materia* therewith.

The serving of such state sentence concurrently with a federal sentence in a Federal Prison satisfies the judgment and sentence of the State Court and discharges the debt to society, the same as if served in a State Prison. Predicated upon the theory that two things equal to the same thing are equal to each other, the serving of a concurrent state sentence in a Federal Prison is equivalent to serving a state sentence in the State Prison within the meaning of the Florida Parole Law. Therefore, the language of Section 12, supra, "and confined in a jail or prison in this State" can and should be construed to mean actually serving the minimum requirement of a state sentence according to law.

To answer this question in the negative would partially defeat the intent and purpose of this law, and deny the right of parole to that class of persons serving concurrent state and federal sentences, as the Federal Authorities would not parole a person knowing that he would be apprehended by the State Authorities and imprisoned in the State Prison for the remainder of his state sentence.

I am therefore of the opinion that the question presented here should be answered in the affirmative, and that such person may be granted a state parole; provided, however, that he or she is concurrently paroled by the Federal Authorities—this latter in order that the state parole may be effective.

May 10, 1944.—044-147.

#### FINE—PAYMENT PRIOR TO PAROLE

QUESTION: 1. Does the granting of a parole to a state prisoner automatically suspend payment of the fine imposed upon him?

2. If such fine must be paid, has the Parole Commission authority to grant a parole prior to its payment?

*To Honorable Joseph Y. Cheney, Chairman, Florida Parole Commission:*

It is the usual practice where the Court imposes a fine to also impose alternative punishment of a term of imprisonment to be served in the event of default in payment of such fine. I have examined a copy of the judgment and sentence rendered against said prisoner from which I find that the Court sentenced him to serve ten years and pay a fine of ten thousand dollars, but failed to impose alternate punishment of a term of years to be served by him in the event of default in the payment of such fine.

The exclusive power to remit fines and grant pardons is vested in the State Pardon Board, and a full and complete pardon granted by that Board removes all penalties and disabilities, and restores an individual to all his civil rights, with the exception that it does not restore offices forfeited or property or interest vested in others as a consequence of the judgment of conviction.

The Parole Commission has no authority to remit fines or grant any form of clemency having the effect of a remission of any fine imposed by virtue of a judgment of conviction. However, the Parole Commission in its discretion could require the payment of a fine as a condition for the granting of a parole in any case.

I am therefore of the opinion that the granting of a parole by the Florida Parole Commission does not suspend payment of the fine imposed by virtue of the judgment of conviction, and further, that it is not necessary that such fine be paid before a parole is granted by the Commission.

May 10, 1944.—044-146.

#### STATE BOARD OF PARDONS—POWER TO REVOKE PAROLES

**QUESTION:** May the State Board of Pardons revoke a parole after the expiration of a period of time equal to the length of the sentence imposed upon such parolee?

*To Honorable J. R. McClure, Secretary, State Board of Pardons:*

The judgment and sentence of the trial court fixes the length of the period to be served by one convicted of crime, but the law fixes the beginning and ending of such period to be the time actually served in the State Prison. Where a prisoner accepts a parole or conditional pardon, he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith.

I note that the State Board of Pardons reserves the right to revoke a parole or conditional pardon in its discretion.

The right of the State Board of Pardons to revoke a parole or conditional pardon after the expiration of a period of time equal to the length of the sentence imposed has been upheld by the Supreme Court of Florida in the case of *State ex rel. Brown v. Mayo*, 171 So. 822, and cases prior thereto, and I am unable to find where this decision has been overruled.

I am therefore of the opinion that the State Board of Pardons has the right to revoke a parole or conditional pardon after the expiration of a period of time equal to the length of the sentence imposed upon the prisoner.

March 9, 1943.—043-68.

#### UNIFORM EXTRADITION ACT

**QUESTION:** 1. Do the provisions of an interstate compact as authorized by Chapter 20455, Acts of 1941, the Uniform Act for Out-of-State Parolee Supervision, (Section 949.07, Florida Statutes, 1941) supersede the provisions of Section 10, Chapter 20460, Acts of 1941, the Uniform Interstate Extradition Act (Section 941.10, Florida Statutes, 1941), which requires that an arrested person be taken before the Judge of a Court of Record, informed of his rights, etc., where he may in writing waive extradition or indicate his intention to institute habeas corpus?

2. Where a prisoner accepts parole, one of the conditions of which is that he will waive extradition if parole is revoked, and he is recalled from another state, are such waivers binding or can the parolee recant from such agreement?

*To Honorable Francis R. Bridges, Jr., Chairman, Florida Parole Commission:*

1. In view of the fact that both laws were enacted at the 1941 Legislative Session, we must presume that the Legislature considered each act in relation to the other, which likewise requires that they be construed in *pari materia*. While Chapter 20455 purports to deal with fugitives from



justice and Chapter 20460 with probationers and parolees, it has been held that a convict whose parole has been revoked is a fugitive from justice within the meaning of Revised Statutes, Section 5728, 18 U. S. C. A. Section 662, even though he entered the asylum state with the consent of the paroling authorities, and is subject to return to the demanding state by extradition proceedings, *Ex parte Tenner*, 128 Pac. 2d. 338; 78 A. L. R. 419; 8 A. L. R. 903.

Section 1, Chapter 20455 (Section 949.07(3), Florida Statutes, 1941), provides in part: "All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such person." In *Ex parte Tenner*, supra, which involved a parolee retaken under an interstate pact with the same provision, the California Court said:

"This can only mean that states which are parties to the compact have established a method to procure the return of parolees from one state to another, which is entirely independent of the extradition procedure. . . . Of course, when a state elects to use the method of federal jurisdiction, and in so doing has made the demand as required by the Constitution and Act of Congress, the federal law applies and governs the procedure of return. . . . And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive, of course, has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly, the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee whose parole has been revoked to claim that he may only be removed by the method of his choosing."

It is my opinion that Section 1, Chapter 20455, which authorizes the interstate compact, is not in conflict with and does not supersede Section 10, Chapter 20460; but rather that said Acts provide alternate procedures for the return of parolees. However, should the demanding state proceed or elect to make demand for the return of the parolee under the procedure and provisions of the Extradition Act, then all requirements of said Act should be complied with.

2. In *Fuller v. State*, 122 Ala. 32, 26 So. 146, it was held that the parole of a convict is in the nature of a conditional pardon. A parole, like every other pardon, is subject to acceptance of the convict. If he elects to accept the parole, and avails himself of the liberty it confers, he must do so on the conditions upon which it was granted to him.

You state that in accepting a parole a Florida prisoner signs a written statement or agreement that he will waive extradition in the event he is recalled to the State. The rule adhered to by the Florida Courts is that in accepting a conditional pardon the prisoner is bound by all of its conditions and limitations, and is subject to summary arrest and recommitment if so provided therein. *Ex parte Alvarez*, 50 Fla. 24, 39 So. 481; *State v. Herne*, 52 Fla. 125, 42 So. 388; *State ex rel. Brown v. Mayo*, 171 So. 822; *State ex rel. Morenco v. Mayo*, 175 So. 806.

In accepting a parole giving him liberty beyond the State of Florida, a prisoner is charged with knowledge of Chapter 20455, which expressly waives the requirements of extradition. The pertinent parts of such Act must be considered as conditions of his parole, and by his acceptance thereof, under the provisions of said chapter, he may summarily be retaken by accredited officers.

In *Ex parte Tenner*, supra, the California Court had before it that section of the Uniform Out-of-State Parole Act which authorizes summary parolee arrest, and held that, "Once having elected to accept parole, the parolee is bound by the express terms of his conditional release."

It is my opinion that after acceptance of parole a prisoner cannot in any way recant from or avoid the conditions of his parole, or the provisions of said Chapter 20455.

I wish to advise further that nothing contained in either of the laws discussed can operate to deprive any prisoner of his constitutional right to petition a court of competent jurisdiction for a writ of habeas corpus to test the legality of his detention.

### PROBATION

March 17, 1943.—043-77.

#### COUNTY PRISONERS—RELEASE FOR MILITARY SERVICE

**QUESTION:** What is the authority of a trial judge to release county prisoners for service in the armed forces of the United States?

*To Honorable Ralph Davis, Secretary, Board of Pardons:*

Such practice would be in the nature of a "commutation of sentence," as defined in *Stone, Sheriff, v. Burch*, 154 So. 128.

Under Chapter 948, Florida Statutes, 1941, courts may, as to a defendant found guilty upon verdict or plea, stay or suspend the imposition of sentence and place him on probation. However, "Unless the judgment of the court was void, the court was without authority to vacate the same after the expiration of the term of the court at which it was entered." *Preston v. State*, 117 Fla. 618, 158 So. 135.

Section 12, Article IV, Florida Constitution, provides that the Pardon Board may "remit fines and forfeitures, commute punishment and grant pardons after conviction." The word "conviction" as therein used includes the sentence or judgment of the Court; *State v. Barnes*, 4 So. 560, *Ellis v. State*, 129 So. 106. The power to grant commutation of judgments and sentences is vested in the State Board of Pardons. *Sawyer v. State*, 4 So. 2d 713.

The above is subject to the established rule that: "Prior to the adjournment of the term or other time fixed in which the cause passes beyond the jurisdiction of the court and becomes final, any court of record has full control of its judgments or decrees and can set them aside and reform them as it may deem right and legal. The rule applies to civil and criminal cases alike and may be effected on the Court's own motion or on being advised by any party in interest." *State v. Lake*, 129 So. 827.

However, if the defendant has entered upon the execution of a valid sentence, the Court cannot, even during the term at which the sentence was rendered, modify, change, revise or set aside such sentence. *Tillman v. State*, 58 Fla. 113, 50 So. 675, 16 C. J., p. 1314.

It is, therefore, my opinion that if the defendant has entered upon the execution of a valid sentence or the term at which the judgment of conviction has expired or been adjourned, the trial judge has no authority to release a county prisoner for service in the armed forces of the United States, or otherwise; and if any such release or commutation of sentence is desired, the State Board of Pardons is the only body authorized to grant the same.

December 20, 1943.—043-343.

### LOSS OF CIVIL RIGHTS

**QUESTION:** 1. Does conviction of a felony result in loss of civil rights and the right to register for or vote at any election?

2. If loss occurs, are civil rights restored automatically upon discharge from sentence?

3. If loss occurs, and the convicted person is paroled and finally discharged from sentence, are civil rights restored when discharged?

4. If judgment is entered, execution stayed, the person placed on probation and finally discharged from probation, are civil rights restored upon the discharge from probation?

5. If civil rights are not restored by discharge from sentence, parole or probation, is it necessary to secure an Executive pardon in all cases before civil rights and the right to register and vote are restored?

6. Are civil rights lost by reason of conviction of any crime less than a felony?

*To Honorable George W. Tyler, District Operations Officer,  
U. S. Department of Justice, Seattle, Washington:*

These questions will be answered by the number given them.

1. Yes. Section 4, Article VI, Constitution of Florida. Section 98.01, Florida Statutes, 1941.

2. No.

3. No. Chapter 948, Florida Statutes, 1941.

4. Civil rights are not lost unless a person is convicted of a crime. In this state a person is placed on probation before the entry of judgment of conviction, and such judgment and the imposition of sentence is suspended and not entered at all unless the probation is subsequently revoked. A plea of guilty or verdict of guilty is insufficient to deprive a person of his civil rights until a judgment of conviction is entered. Chapter 948, Florida Statutes, 1941.

5. Yes. It is necessary to obtain a full pardon restoring citizenship from the State Board of Pardons. Section 12, Article IV, Constitution of Florida.

6. Yes. Bribery, perjury, or larceny, or any infamous crime. See Section 98.01, Florida Statutes, 1941. Under this section persons convicted of petit larceny, a misdemeanor, would be deprived of their citizenship. The Supreme Court of Florida has held the meaning of infamous crimes and felonies to be synonymous. *Adams v. Elliott*, 174 So. 731.

This is not to be considered as an official opinion, as the Attorney General is not permitted to render official opinions to anyone except State Officers, Boards, and Departments.

## CONVICTS

August 4, 1944.—044-225.

### EQUIPMENT FOR FEEDING PRISONERS

QUESTION: Should the county furnish a dining room and equipment for feeding county prisoners?

*To Honorable J. M. Lee, State Comptroller:*

It is my opinion that there is no obligation upon the County Commissioners or the County to furnish cooking utensils, dishes, an electric ice box, etc., for use in the feeding of the prisoners.

March 27, 1944.—044-101.

### TRUSTY—WORK IN CONSTABLE'S OFFICE

QUESTION: Have the County Commissioners authority to permit a trusty from the County Prison Farm to do utility work in a Constable's office?

*To Honorable Spessard L. Holland, Governor:*

It appears from a newspaper article that the prisoner was ordered to a certain prison camp on January 22nd and he was returned to the office of the Constable on February 22nd. From this newspaper article it appears that now the trusty runs errands for the Constable and spends no time, either day or night, in the prison camp or the county jail. Said article also states that the records in the Sheriff's office show only that this supposed trusty was sent to the convict camp and that as far as the Sheriff is advised he is still in the camp.

I have carefully examined the statutes on the subject of county prisoners and I am unable to find where any county official has authority to allow a county prisoner to work for a Constable and to remain out of the county jail or the county prison camp except when such prisoner is working on roads and bridges in the county. As you know, the county prison farm is under the jurisdiction of the County Commissioners and therefore they would be responsible for the condition which exists with regard to this trusty, if the newspaper account is correct, and since you have the power to suspend a county official if he is guilty of violating the law, you can control the situation by requiring the County Commissioners to comply with the law or be suspended from office.

July 3, 1944.—044-190.

#### WORK AT THE STATE TUBERCULOSIS SANATORIUM

**QUESTION:** Is there any statute which prohibits the use of colored female convicts for work at the State Tuberculosis Sanatorium at Orlando, where such convicts may be exposed to the infectious diseases of tuberculosis?

*To Honorable J. R. McClure, Board of Commissioners of State Institutions:*

I fail to find any statute directly on this point. However, a study of Chapters 952 and 954, Florida Statutes, 1941, indicates it was and is the meaning and intent of these laws that state convicts shall not be required to work under conditions which would be detrimental to their physical well-being or health. The question as framed indicates possible exposure to the infectious disease of tuberculosis, if such convicts were assigned to work in the institution named. It is a recognized fact that many persons not convicts might reasonably refuse to accept employment at any institution for the treatment of tuberculosis, where such employment would expose them to the disease.

In my opinion, the Board of Commissioners of State Institutions has no authority to transfer colored female state convicts to the State Tuberculosis Sanatorium under the stated circumstances and for the purpose set forth.

#### STATE PRISON FARM

February 17, 1944.—044-57.

#### SALE OF PERSONAL PROPERTY

**QUESTION:** Are cattle and hogs "home grown materials" in the purview of the law?

*To Honorable L. F. Chapman, Superintendent, Florida State Prison,  
Raiford, Florida:*

I have examined Chapter 21781, Acts of 1943, and find that in addition to the part you quote the word "similar" appears, so that when given full effect the Act applies only to "similar home grown materials."



In the circumstances it is my opinion that the Act was not intended to apply to or comprehend the proceeds of the sales of cattle and hogs.

By Sections 116.13 and 116.14 it appears that sales of state property may be made with the consent of the Boards of Commissioners or Trustees, and that when so made a receipt is to be taken from the purchaser and forwarded with the proceeds of the sale to the State Treasurer.

I can see no practical difficulty in attaining the desired result, and believe it may be done by reporting such sales to the Board of Commissioners and obtaining a resolution requesting the Treasurer to sequester the proceeds of such sales and earmark the same so that when the next session arrives an appropriate bill similar to Chapter 21781 may be passed authorizing their inclusion in the State Prison Improvement Fund.

I make this suggestion in view of the fact that there is apparently no present intention to disburse these funds.

February 8, 1944.—044-45.

#### SECURITY—DEPOSIT OF FUNDS DERIVED FROM FARM PRODUCE

QUESTION: May the deposit of funds received by the Superintendent of the Florida State Farm at Raiford from the sale of farm produce, natural resources and the like, legally be secured by collateral deposited with the State Treasurer under an agreement between the State Treasurer, the depository bank, and the Superintendent of said State Farm?

*To Honorable J. Edwin Larson, State Treasurer:*

Under date of January 6, 1944, I rendered you an opinion involving similar funds in the hands of the Superintendent of the State Hospital. There appears, however, to be a distinction between the two situations. Sections 116.13 and 116.14, referred to in the State Hospital opinion, apply only to the Superintendents of State Asylums and the Presidents and Principals of all State Educational Institutions, and it is my opinion that said statutes do not contemplate the Superintendent of the State Farm at Raiford, which is a penal institution and is not to be considered as an asylum or an educational institution.

Also, Section 954.39, Florida Statutes 1941, specifically provides that the Superintendent of the State Prison Farm shall have charge of the prison and all property pertaining thereto, that he shall be treasurer of the prison, and shall cause to be kept in suitable books regular and complete accounts of all the property, expenses, income, business and concerns of the establishment, and Section 954.36, Florida Statutes, 1941, requires said Superintendent to execute a bond in the sum of at least \$10,000 conditioned to faithfully account for all public moneys placed in his hands and all property pertaining to the prison.

It is therefore my opinion that the Superintendent of the State Prison Farm may deposit moneys derived from the sale of farm produce, natural resources, and other moneys belonging to the prison, in an account under his jurisdiction and control, pending its transfer to the State Treasurer, which transfer should be made at reasonable intervals inasmuch as all such funds are State Funds and under the Constitution should be deposited with the State Treasurer. It is further my opinion that the deposit of such funds in a temporary account under the control and jurisdiction of said Superintendent may be secured by collateral deposited with the State Treasurer, provided the same is effected through an agreement between the State Treasurer, the depository bank, and said Superintendent.

**GAIN TIME**

April 7, 1943.—043-93.

**SELF-INJURY—EFFECT OF**

**QUESTION:** 1. Does one who inflicts an injury upon himself commit a crime, with special reference to the possibility of such being criminal and classifiable under the term "malingering"?

2. Can the gain time of a prisoner held in the state prison, not accrued, be taken away from him before its accrual for acts committed by him prior to the accrual of such gain time?

*To The Board of Commissioners of State Institutions:*

My opinion is that a prisoner who inflicts a self-injury of a temporary disabling nature is not guilty of any offense that can be punished other than by loss of accumulated gain time up to the time of the act, or by such form of punishment as is otherwise adopted for the purpose of maintaining discipline, etc., of prisoners. Of course, a prisoner may be guilty of an offense if he aids or abets in the physical injuring or disabling of another prisoner, even though with the consent of such other prisoner.

# INDEX

## A

<b>ACCOUNTANCY, BOARD OF</b>	<b>Page</b>
Examinations; waiver	413
Internal Revenue Agents; classification	412
Records; storage, destruction	414
 <b>ACTIONS</b>	
County Officers; bond; procedure	132
 <b>ADMINISTRATION, BOARD OF</b>	
Bonds; redemption; procedure	325
Funds; investment	
County bonds	323
Short term government certificates	323
Gas tax funds; allocation	322
Investments	323, 324
Judgments; bonds, interest coupons, etc.	325
Records; consolidation; investments	324
Tax anticipation certificates; security; county funds	186
 <b>AGENTS</b>	
Insurance	
Nonresident license tax	464
Residents and nonresidents	469
 <b>AGREEMENTS</b>	
Board of Education; authority of state superintendent to execute	242
Florida Council for the Blind with Federal Government; authority	371
 <b>AIR RAID ALARMS</b>	
Installation; maintenance	289
 <b>ALCOHOLIC BEVERAGES AND LIQUORS</b>	
Definitions	444, 446
Forfeiture; destruction or sale	409, 445
Hours of sale	444, 446
License tax	
Determination	441
Municipalities; power to levy	443
Local option elections; constitutionality	448
Manufacture of fruit spirits in dry counties	442
Possession without license; more than 1% alcohol	444
Sale to married minor	447
Territory where sale is permissible	443
Wholesalers; refusal to sell to retailers	434
 <b>ALIENS</b>	
Examination in basic sciences	399
Florida State Hospital; admittance; eligibility	360, 363
Masseurs; citizenship, registration, etc.	423
Nurses	
Issuance of temporary permit	408
Registration	409
 <b>ALLIGATOR HIDES</b>	
Disposition by court	327

<b>ANTI-RABIES CAMPAIGN</b>	<b>Page</b>
Board of Health; authority	341
<b>APPEALS</b>	
Criminal; prosecuting attorney; duties	108
<b>APPOINTMENTS</b>	
Building engineer, by County Board of Public Instruction; legality	245
<b>APPROPRIATIONS</b>	
A. & M. College for negroes	284
Fire control districts	302
Funds, State Library; money received; depositing	296
Hog cholera serum and virus; effective date	449
State Livestock Sanitary Board; when available	238
State Welfare Board; expenditures	369
University of Florida; Seagle Building	285
Veto by Governor	98
<b>APPROPRIATIONS AND EXPENDITURES</b>	<b>9</b>
<b>ARMY POST EXCHANGES</b>	
Motor vehicles operated; licenses	312
<b>ARRESTS</b>	
County traffic officers; fees	189
Criminal cases, without warrant; procedure	497
Game wardens; mileage fees	332
Highway patrolmen; procedure	316
<b>ASSISTANT STATE ATTORNEY</b>	
Information; authority to file	109
Salaries; effect of subsequent statute	109
<b>ATTORNEYS GENERAL, FORMER; LIST</b>	<b>10</b>
<b>AUTOMOBILE DEALERS</b>	
Insurance agents; licenses	465
<b>AUTOMOBILES</b>	
Purchase by County Commissioners for official use	183
<b>AVIATION GASOLINE</b>	
Use in motor boat; taxability	234
<b>B</b>	
<b>BAIL BOND</b>	
Approval; fees	495
<b>BALLOTS</b>	
General election	
Arrangement of candidates' names	150
Marking	148
Placing of candidates' names	149, 151
Printing of candidates' names	152
<b>BANKRUPTCY</b>	
Funds held by Trustee; pledge of assets; security	480
<b>BANKS AND BANKING</b>	
Morris Plan Banks; filing fee	461
Securities	
Bankruptcy; funds held by Trustees	480
Overseas Road and Toll Bridge District Funds	105
Trust companies; deposited securities	481, 482



<b>BASIC SCIENCE BOARD</b>	<b>Page</b>
Aliens; examination	399
Examinations; citizenship requirements	399
<b>BASTARDS</b>	
Proceedings; payment of costs; deposits	503
<b>BEAUTY CULTURE LAW</b>	
Barber; employment in salon	416
Examinations	
Applications, etc.	414
Certificates; issuance; fee	417
Prerequisites and qualifications; fees	415
Refunds; certificate fees	417
Junior operators	
Certificate fraudulently obtained	418
Fees	415, 417
Issuance of nonresident permit	419
License, additional	420
Manicuring or pedicuring	
Nonresident permits	420
Sign; display	419
Massage Registration Act; effect	418
Nurse; employment in salon	416
Registration certificates	
Fee	417
Prerequisites	421
Schools	
Compensation of teachers	421
Teachers' certificates; prerequisites; renewals	421
Shops; sale of gifts, etc.	420
State Board; transfer of funds	237
Women's Army Corps operating shop; jurisdiction of Board	416
<b>BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS,</b> see INSURANCE	
<b>BEVERAGES, see ALCOHOLIC BEVERAGES AND LIQUORS</b>	
<b>BIRTH CERTIFICATES</b>	
Sealed; opening	353
<b>BLACKOUTS</b>	
Air raid sirens; maintenance	289
Auxiliary firemen	287
<b>BLUE LAWS</b>	
Sunday hunting	492
<b>BLUE SKY LAWS</b>	
Bond of dealers; substitution	431
<b>BOARD OF ADMINISTRATION</b>	
Funds; investment	323
<b>BOARD OF COMMISSIONERS OF STATE INSTITUTIONS, see</b> <b>STATE INSTITUTIONS, BOARD OF COMMISSIONERS</b>	
<b>BOARD OF HEALTH, see HEALTH, BOARD OF</b>	
<b>BOARD OF MASSAGE</b>	
Inspector's fees	424
<b>BOARD OF PUBLIC INSTRUCTION</b>	
Deposit of county funds	187

<b>BONDS</b>	<b>Page</b>
Board of Administration	
Investing county funds in bonds of another county	323
Redemption; procedure	325
County officers	
Actions; procedure	132
Cancellation; return of commission tax	162
Period of extension	187
Documentary stamp tax	223
Duplicate warrants; Comptroller and Treasurer	98
School district; Board of Forestry and Parks; payment of assessment	454
Substitution; securities commission	431
<b>BROWARD COUNTY</b>	
Seminole Indian Reservation; leasing, fencing, posting	304
Special census; effect on population laws	192
<b>BUDGET COMMISSION</b>	
County Commissioners' budget; increase; approval	186
<b>BURIAL INSURANCE</b>	
Real estate; conveyance in trust, release	475
<b>C</b>	
<b>CANDIDATES</b>	
Congressional Executive Committee; sixth district; election	156
Congressman, sixth district; nomination	156
County Solicitor; filing oath; paying fee	153
Delegates to national convention, sixth district; election	156
Fee; refund	153
Independent; names on ballots	139
Judge, Criminal Courts of Record; filing oath; paying fee	153
Military force; proxy; required oath	154
Oaths; omission	154
Party assessments; disposition	140
State Legislature; party assessments	140
<b>CAPIAS</b>	
Necessity; accused in custody	497
<b>CASES HANDLED IN ATTORNEY GENERAL'S OFFICE</b>	7
<b>CERTIFIED PUBLIC ACCOUNTANTS</b>	
Internal revenue agents; classification; right to certificate	412, 413
<b>CHAIN STORE TAX</b>	
Additional; power of Comptroller to collect	228
<b>CHANCERY PROCEDURE</b>	
Divorce suits; proof of deposition	133
<b>CHILD LABOR LAW</b>	
Minors; employment	
Married female	395
Milk delivery	396
School attendance	396
Wholesale liquor dealer	398
<b>CHIROPODISTS</b>	
Narcotic drugs; authority to prescribe	401
<b>CHIROPRACTOR</b>	
Licenses, reciprocal; issuance	400

<b>CIGARETTE TAX</b>	Page
Exemptions; post exchanges; ship service store	223
Funds; disposition by State Beverage Department	236
Funds supplementing race track funds; transfer; expenditures	184
<b>CIRCUIT COURTS</b>	
Clerk, see <b>CLERK, CIRCUIT COURT</b>	
Clerks; commissions	134
Jurors; payment in unlawful detainer suits	130
<b>CIRCUIT JUDGES</b>	
Disqualification; appointment of substitute	108
<b>CIRCUSES AND SHOWS</b>	
Exhibition of animals; license taxes	231
<b>CITIES AND TOWNS</b>	
Municipalities; corporate limits	193
Seizure and sale of abandoned cars; ordinance; issuance of certificate of title to purchasers	312
<b>CITRUS GROWERS</b>	
License to transact insurance business on mutual plan	471
<b>CIVIL AND MILITARY COURTS</b>	
Concurrent jurisdiction	495
<b>CIVIL RIGHTS</b>	
Restoration	
Pardon Board; paroles	505, 506
Voters; qualifications	510
When convicted of felony	505
<b>CIVIL SERVICE BOARD</b>	
Dual offices	161
Fee to Secretary of State	162
<b>CLERK, CIRCUIT COURT</b>	
Authority to issue tax deeds	309
Commissions in declaration of taking proceedings	134
County tax liens; sale; procedure	200
Deputies; appointment, duties, powers	110
Duties; effect of Senate Bill 258	111
Fees	
Instruments; recording	113
Uncollected; procedure	112
Judgments; entering, recording	114
Military leave of absence	
Acting Clerk; appointment of Deputies; bond	165
Powers, duties; collection of municipal taxes	200
Powers, duties and responsibilities	110, 111, 114
Qualification fees of candidates for county offices	155
Recording warranty deed when property description unintelligible	115
<b>CLERK OF CIVIL COURT OF RECORD, REPORT</b>	68
<b>CLERKS OF CIRCUIT COURTS, REPORTS</b>	66, 67
<b>CLERK OF COURT OF RECORD, ESCAMBIA COUNTY, REPORT</b>	68
<b>CLERKS OF COURTS</b>	
Registry funds unclaimed; procedure	132

<b>COMMISSIONS</b>		<b>Page</b>
Issuance by Governor		95
Tax Assessors	209, 214,	215
Tax Collectors	213, 214,	215
Deductions		215
<b>COMMON LAW MARRIAGE</b>		
Change to legal marriage		488
<b>COMPENSATION</b>		
Auxiliary firemen; injury or death		287
Beauty culture teachers		421
Board of Examiners of Nurses; members		405
Military leave		
County Officers; computation		167
Fee officers; computation		170
State and County Officers; computation		167
Tax Assessors and Collectors; calculation		214
<b>COMPTROLLER</b>		
Chain store tax, additional; power to collect		228
Duplicate warrants; responsibility; bond		98
Old age assistance; state welfare board		372
Receipt of incoming Treasurer; form		104
Side shows; freaks; license taxes		234
Warrants		
Issuance to sculptor for memorial statue		298
Purchase of land; issuance		99
<b>CONFEDERATE PENSIONS, see PENSIONS</b>		
<b>CONSERVATION, BOARD OF</b>		
Game wardens; arrests; mileage fees		332
Salt water fisheries		
Fish brought into Florida for processing and shipment		333
Force trap nets		335
Mullet; taking, in closed season for use in war effort		338
Sponges		334
Shell fish; extension of open season		339
<b>CONSTABLES</b>		
Convicts; trusty; utility work in office		511
Fees		
Approving bail bond		495
Criminal investigation		119
Justice of Peace Courts; right to serve process		129
<b>CONTRACTS</b>		
Contingent mortality endowment		472
Deferred payment; execution by County Board of Public In-		
struction		265
Effective date of insurance policies		476
Foreign; documentary stamp tax		226
<b>CONTROL, BOARD OF</b>		
Appropriations		
A. & M. College for negroes		284
Effect of Governor's veto		98
Contract with Board of Pharmacy; authority to execute		284
Demonstration School unit; rented by county board		249
Teachers; employment when over seventy		276
Vouchers; payment from Permanent Building Fund		284



CONVICTS	Page
Civil rights; restoration	510
County prisoners; equipment for feeding	511
Fine; payment prior to parole	507
Pardons; restoration of civil rights	505
Revocation of paroles	508
Self-injury; loss of gain time	514
Trusty; work in Constable's office	511
Use of colored females for work at the State Tuberculosis Sanatorium	512

COPYRIGHTS	
Board of Commissioners of State Institutions; royalties on "Florida Guide"; disposition	265

CORPORATIONS	
Capital Stock Tax	
Exemption	458
Liability	459
Foreign; stock transfer; tax	226
Intangible personal property taxation	222
Permits to foreign, bearing same name	462
Power of appointment; intangible taxes	458

COST BILLS	
Required contents	188

COSTS	
Bastardy proceedings; deposits	503
Magistrate without jurisdiction; payment	189
Remission after conviction	331

COUNTY BOARD OF PUBLIC INSTRUCTION	
Appointments; legality when one member not commissioned	245
Attorney; services	242
Candidate; Teachers' Retirement System beneficiary	283
Civil responsibility for death of student	247
Compensation of teachers over seventy	275
Deferred payment contracts; execution	265
Duval County budget; jurisdiction of Budget Commission	268
Election districts; change of boundaries	252
Extracurricular activity funds; responsibility	246
Leon County; replacement of race track funds	436
Madison County; replacement of race track funds	436
Member	
Holding dual offices	257
Legality of claim for salary	251
Payment for driving school bus	262
Teachers' Retirement System benefits	283
Office building; purchase, repair	178
Pupils of parochial schools, transportation in county busses	262
Pupils; suspension for nonparticipation in military drills	248
Purchase of U. S. war bonds	269
Rental of Demonstration School unit	249
School buildings and grounds; use for other purposes	243
School bus purchases	271
Superintendent	
Service credit; superintendents, teachers	280, 281

COUNTY BUDGET COMMISSION	
Powers and duties	251

<b>COUNTY BUDGETS</b>	<b>Page</b>
Commission; adoption of school budget	267
Duval County; powers, Budget Commission	208
Polk County; jurisdiction; Budget Commission	208
<b>COUNTY COMMISSIONER</b>	
Automobiles; purchase for official use	183
Ballots for voting machines; preparation	147
Bonds; period of extension	187
Budgets; increase; approval	186
Convicts; county prisoners; equipment for feeding	511
Cost bills; required contents	188
County Judge	
Office expenses	134
Office supplies; furnishing	177
Deposit of county funds	187
Elections	
Petition for referendum	179
Publication of list of electors; approval; payment	136
Redistricted county	159
Employment of officers for rehabilitation of veterans	183
General election ballots	149
Jails; sanitary condition	175
Military leave; appointment of Acting Commissioner	164
Postwar planning	181
Powers	
Convicts; trusty; work in Constable's office	511
Leasing county property to Federal Government	180
Repairs for County Board of Public Instruction	178
<b>COUNTY COURTHOUSE</b>	
Millage for construction	207
<b>COUNTY COURTS</b>	
Docket fee in civil cases	124
Jurors; payment in unlawful detainer suits	130
Narcotic Law violation; jurisdiction	367
<b>COUNTY DEMOCRATIC EXECUTIVE COMMITTEE</b>	
Selection of nominee	157
<b>COUNTY DEPOSITORIES</b>	
Security acceptable	186
Tax Collector; deposit of county funds	187
<b>COUNTY ELECTION BOARD</b>	
Creation; constitutionality	136
<b>COUNTY FIRE CONTROL UNITS</b>	
State aid; apportionment	456
<b>COUNTY FUNDS</b>	
Depositories; security acceptable	186
<b>COUNTY HEALTH OFFICERS</b>	
Venereal disease infected persons; transportation to Quarantine Hospital	352
<b>COUNTY HOSPITALS</b>	
Jackson County Hospital Corporation; powers	191
<b>COUNTY JAILS</b>	
Municipalities; right to use	175
Sanitation; duties of Sheriff, County Commissioners	175

<b>COUNTY JUDGES</b>	<b>Page</b>
Costs; remission	331
Discretion in issuing marriage licenses	488
Intoxicating liquors; forfeiture; disposition	445
Jurisdiction; Courts of Record	125
Jurisdiction to try escaped county prisoners	125
Military leave; substitution	164
Office expenses paid by County Commissioners	134
Office supplies furnished by County Commissioners	177
Trial of parents on school attendance charges	260
<b>COUNTY JUDGE'S COURT</b>	
Crippled child of serviceman; custody	375
School attendance; trial of parents without jury	260
Trial without issuance of warrants	502
<b>COUNTY OFFICERS</b>	
Attorney	
County Board of Public Instruction; services	242
Power to change criminal charges, etc.	123
Bonds	
Actions; procedure	132
Cancellation; return of commission tax	162
Substitution; securities commission	163
Budgets; determination	177, 185, 268
Candidates; payment of qualification fees	155
Commissioners; leasing county property to Federal Government	180
Cost bills; required contents	188
Duties, responsibilities	175, 178, 180, 184, 188, 189
Fees	189, 353
Holding two or more offices	257
Military leave of absence; compensation, computation	167
Qualifying; procedure	153
Removal; salary claims	251
Road patrolmen; arrests; service of process	117
Salaries; School Superintendents	257
<b>COUNTY PROPERTY</b>	
Lease to Federal Government by County Commissioners	180
<b>COUNTY ROAD PATROLMEN</b>	
Arrests; service of process	117
<b>COUNTY SCHOLARSHIPS</b>	
State College; requirements	286
<b>COUNTY SOLICITORS</b>	
Power to change criminal charges	123
Qualifying; procedure	228
<b>COUNTY SOLICITORS, REPORTS</b>	5, 6
<b>COUNTY SUPERINTENDENTS—POWERS</b>	
Jehovah's Witnesses; refusal to salute the flag	256
<b>COUNTY SURVEYOR</b>	
Vacancy in nomination	158
<b>COUNTY TAX LIENS</b>	
Foreclosures	200, 218
Soldiers; sailors; procedure	218
<b>COUNTY TRAFFIC OFFICERS</b>	
Arrests; serving criminal process; fees	189
Road patrolmen; arrests; service of process	117

<b>COURT OF RECORD, ESCAMBIA COUNTY</b>	<b>Page</b>
Judge	
Assignment to Criminal Court of Record	122
Commitment of minors	375
State Attorney; assignment to prosecute cases	122
<b>COUNTY REGISTRY FUNDS</b>	
Unclaimed moneys	
Adjudication	100
Procedure	132
<b>COURTS</b>	
Civil and military; concurrent jurisdiction	495
Disposition of moneys paid into court registry	100, 132
Jurisdiction	
County Attorney; powers; entry of nolle prosequi; Narcotic	
Drug Law	367
Justice of the Peace	128
Powers; county prisoners; release for military service	510
<b>CRIMES</b>	
Definitions; general penalty provisions	498
Drunken driving; prosecution	310
Federal lands; jurisdiction	91
Fictitious Name Law; violations	493
Firearms; Sunday use	492
Gambling; confiscation of slot machines	491
Responsibility of father toward child of insane wife	492
<b>CRIMINAL COURT OF RECORD</b>	
Escambia County; assignment of Judge	122
State Attorney; assignment to prosecute cases	122
<b>CRIMINAL INVESTIGATIONS</b>	
Fees; Constables and Sheriffs	119
<b>CRIMINAL PROCEDURE</b>	
Appeals; State Attorneys; duties	108
Arrests without warrant; preliminary examination; procedure	497
Capias; issuance; accused in custody	497
Costs; remission; County Judge	331
County Judge's Court; trial without issuance of warrant	502
County Solicitors; Prosecuting Attorneys; power to change charges	123
Fines; enforcement against absent defendant	499
Information; authority of Assistant State Attorney to file	109
Judgments; enforcement against absent defendant	499
Jurisdiction; Justice of the Peace, counties having Criminal Court	
Record	126
Search warrants; authority of Municipal Judge to issue	501
State employees; witness and mileage fees	498
Term of imprisonment; commencement	501
<b>CRIPPLED CHILDREN'S COMMISSION</b> see FLORIDA	
<b>CRIPPLED CHILDREN'S COMMISSION</b>	

## D

<b>DADE COUNTY</b>	
Homestead exemption; military force; yearly affidavits	199
<b>DEEDS</b>	
Documentary Stamp Tax exemption; Internal Improvement Fund	225
Recording; duty of Circuit Court Clerk	115
To and from state; Documentary Stamp Tax	225



<b>DEER</b>	<b>Page</b>
Killing, for purpose of tick eradication; claim for services	449
<b>DEFENDANTS</b>	
Absent	
Fines; enforcement	499
Judgments; enforcement	499
<b>DEFENSE</b>	
Housing projects; area of operation	377
Nonresident physicians; registration with Board of Health	344
<b>DEFENSE COUNCIL</b>	
Air raid sirens; installation, maintenance	289
Auxiliary firemen; compensation; injury or death	287
<b>DENTISTS</b>	
Dentures; supply	410
<b>DEPARTMENT OF PUBLIC SAFETY</b> see PUBLIC SAFETY	
<b>DEPENDENT AND DELINQUENT CHILDREN</b>	
Allotments from fathers in service; control and expenditure	376
Child Placing Agency or Children's Home; commitment	373
Crippled child of serviceman; custody	375
Juvenile Court; jurisdiction after marriage	376
Minor of unknown age; commitment	375
State Welfare Board; use of funds for care	370
<b>DEPUTY CLERKS</b>	
Appointment; duties, powers	110
<b>DEPUTY SHERIFFS</b>	
Appointment; service during elections	137
<b>DESCENT AND DISTRIBUTION</b>	
Escheated estates	101
Murderer of decedent as heir; insanity	487
<b>DESERTION OF CHILD</b>	
Responsibility of father toward child of insane wife	492
<b>DISEASES</b>	
Rabies; campaign for elimination	341
Venereal see VENEREAL DISEASES	
<b>DOCUMENTARY STAMP TAX</b>	
Agreements for sale of motor vehicle tires	227
Bonds; mortgages; deed in trust	223
Deeds to and from state	225
Exemption; Internal Improvement Fund deed, contracts	225
Foreign contracts	226
Forthcoming bonds	227
Mortgages; partial assignments	227
Transferred stock	228
<b>DOMESTIC RELATIONS</b>	
Common law marriage; change to legal marriage	488
Proxy marriage by mail	489
<b>DRAINAGE DISTRICTS</b>	
Audit of books; direction of Governor	106
Supervisors; removal or suspension by Governor	106
State lands; liability of State Departments	309

DRUGS	Page
Narcotics	
Addicts; commitment to Hospital at Raiford	365
Certification of nonresident physicians to Federal Bureau of Narcotics	348
Laws; violation	367
Wholesale dealer's license	367
DRY COUNTIES	
Manufacture of fruit spirits	442
DUVAL COUNTY	
Budget Commission	
Jurisdiction; Board of Public Instruction	268
Powers	185
Civil service; public officers	161

## E

EDUCATION	
A. & M. College for negroes; appropriations	284
Board of Control	
Payments from Permanent Building Fund	284
Repeal of appropriation	285
County Superintendent; right to hold municipal office	251
Election districts; change of boundaries	252
School attendance; jurisdiction	260
School districts; consolidation; election	263
Teachers' Retirement System	
Medical examination of members	276
Member; disbursement of contribution	274
Prior service credit	
Reemployment	280
Teaching in foreign country	282
Reinstated members	278
Service credit	
County Superintendent	280, 281
Substitute teacher	281

EDUCATION, BOARD OF	
Authority to lease public lands for development of mineral and petroleum interests	299
Extracurricular activity funds; responsibility	246
Fire control service for school lands; payment	241
Refunding bonds; payment of fee	241
Refunding indebtedness; notes	269
Retirement System; reinstated members	278
School lunchroom program	253
State lands; payment of drainage levy	309
State-owned textbooks; use in nonpublic schools	261
State Superintendent; agreements on behalf of Board; authority	242
Teachers	
Employment when over seventy years old	275, 276
Payment of accumulated sick leave	258
Teachers' certificates; revocation; hearing, etc.	258
Teachers' Salary Fund; transfer of unexpended balance	264
Textbooks; adoption for use of pupils	261

ELECTIONS	Page
Absentee voting; servicemen; registration; war ballots	138
Ballots	
Arrangement and placing of candidates' names	150, 151
Candidates names printed in alphabetical order	152
Determination of names for printing	155
Marking	148
Names of independent candidates	139
Write-in votes; preparation	147
Candidates	
County Offices; qualification fees	155
County Solicitor; Judge, Criminal Court of Record; filing oath, paying fee	153
Fee; refunds	153
Oaths; omission	154
Placing names on ballots	151
Congressional Executive Committee, sixth district	156
Congressman, sixth district; nomination	156
County Commissioners	
Redistricted county	159
Seminole County	149
County Democratic Executive Committee; selection of nominee	157
County Election Board; constitutionality of act creating	136
County Executive Committee; filling of vacancy	159
Delegates to National Convention; sixth district	156
Electors	
Publication of list; approval, payment	136
Transfer or reregistration of electors	147
Legislature; filling vacancies for Extraordinary Session	142
Local option; sale of intoxicating liquors	448
Military Force	
Absentee voting; war ballots	138
Registration; power of attorney	145
Reregistration; Suwannee County	146
Party assessments	
Candidates; State Legislature	140
Disposition; Secretary of State	140
Petition for referendum	179
Political parties; qualification of members	145
Presidential electors; nomination	157
Printing names of candidates on ballots	152
Qualification of candidates; correction of errors	155
Qualification of electors	
Military Force	144
Restoration of civil rights	242
Revocation of resignations	93
Service abroad as part of residence	141
Registering; voting, validity in ceded territory	145
School District Trustees; procedure	259, 264
School districts; ballot, notice, results	264
Secretary of State; candidates qualifying with	153, 155
Sheriffs; Deputies	137
Special primary; filling vacancy	159
Supervisors of Registration; official seal; certificates	148
Successor to deceased Sheriff	141
Suwannee County; Military Force; reregistration	146
Vacancy in nominations	158
Voting machines	
Custodians	152
Write-in votes; preparation	147
War ballots	
Affidavit required	152
Vacancy in nominations	160

<b>EMIGRANT LABOR AGENTS</b>	<b>Page</b>
Prosecution .....	393
<b>EMPLOYEES</b>	
Board of Forestry; responsibility for loss of tools and equipment .....	452
Board of Health; commissioned as notaries public .....	344
Federal-State; mileage .....	457
Florida Council for the Blind	
Salaries .....	371
Vending stand operators .....	380
Florida Crippled Children's Commission; military leave of absence; re-employment .....	168
State and county; fee officers; military leave of absence; compensation .....	170
State Welfare Board; salary limitation .....	372
<b>EMPLOYERS</b>	
Examination of books by Industrial Commission .....	383
<b>ESCAMBIA COUNTY</b>	
Cigarette tax funds; transfer, expenditure .....	184
<b>ESCHEATED ESTATES</b>	
Disposition; State Treasurer .....	101
<b>ESTATES</b>	
Distribution; murderer of decedent; heir adjudged insane .....	487
Legatee; stock; Documentary Stamp Tax .....	226
<b>EVERGLADES DRAINAGE DISTRICT</b>	
Compensation to Tax Assessor for unofficial work .....	210
Tax deeds; issuance by Clerk of Circuit Court .....	309
Tax liens .....	196
<b>EVERGLADES FIRE CONTROL DISTRICT</b>	
Expenditures; construction of building .....	173
<b>EVERGLADES NATIONAL PARK</b>	
Power to convey lands and jurisdiction to United States .....	296
<b>EXAMINATIONS</b>	
Basic sciences; citizenship requirements .....	399
Beauty culture; application; time for filing .....	414
Nurses	
Age requirements .....	404
Board of Examiners; quorum .....	406
<b>EXECUTION</b>	
Death warrant; earliest date of issuance .....	500
<b>EXEMPTIONS</b>	
Cigarette Tax; post exchange, ship service stores .....	223
Constitutional .....	198, 199, 200, 217
Documentary Stamp Tax; Internal Improvement Fund .....	225
Governmental Agencies .....	234
Homestead .....	198, 199, 200
School property; college fraternity houses .....	195
<b>EXPENSES</b>	
Board of Examiners of Nurses; signing requisitions and vouchers .....	407
Sheriffs; returning prisoners to Florida .....	116
<b>EXPLOSIVES</b>	
License to possess .....	439
Licensing Government Agencies .....	439



<b>EXTRADITION</b>	<b>Page</b>
Uniform Interstate Extradition Act; construction .....	508
<b>EXTRADITION STATISTICS</b> .....	8

## F

<b>FEDERAL BUREAU OF NARCOTICS</b>	
Out-of-state physicians; certification .....	348
<b>FEDERAL GOVERNMENT</b>	
Condemnation of property in game refuge .....	329
<b>FEES</b>	
Beauty culture; examination; certificate; refunds .....	417
Candidates; refunds .....	153
Civil Service Board, Commission; reimbursement .....	162
Clerk Circuit Court	
Candidates; qualifications .....	155
Instrument recording .....	113
Uncollected fees; procedure .....	112
Constables	
Approving bail bond .....	495
Criminal investigations .....	119
County traffic officer	
Arrests; serving criminal process .....	117, 189
Docket; civil cases .....	124
Filing; Morris Plan Bank corporation report .....	461
Game wardens; arrests .....	332
Justice of the Peace; committing magistrate .....	128
Motor vehicle commissioner; recording satisfaction of lien .....	312
Sheriffs	
Approving bail bond .....	495
Arrests; mileage .....	189
Criminal investigations .....	119
Mileage .....	120
Parole revocation hearing .....	118
Person detained under writ of ne exeat .....	133
Returning prisoners	
From another county .....	120
To Florida .....	116
Tax warrants; costs, posting bond, recording .....	387
Transportation of	
Escaped prisoners .....	116
Venereal patients .....	121
Tax assessors and collectors; calculation .....	214
<b>FICTITIOUS NAME LAW</b>	
Registration; cancellation .....	493
<b>FILLED-IN LANDS</b>	
Title; acquisition .....	292
<b>FINES AND PENALTIES</b>	
Absent defendant; enforcement .....	499
<b>FIRE CONTROL DISTRICT</b>	
Appropriation under Ch. 20973; effect of Ch. 22000 .....	302
<b>FIREARMS</b>	
Carrying after dark in certain areas .....	328
Sunday use; legality .....	492

<b>FISH</b>	<b>Page</b>
Black bass; closed season in St. Johns River .....	328
Closed season	
Crawfish .....	333
Mullet; seizure .....	337
Control of fish ponds .....	329
Fresh and salt waters; lines of demarcation .....	327
Phosphate pits; jurisdiction .....	330
Salt water; brought into Florida for processing and shipment .....	333
Salt water fisheries; force trap nets .....	335
<b>FLAG</b>	
Public Schools; salute, allegiance .....	256
<b>FLORIDA CITRUS EXCHANGE</b>	
Insurance; reciprocal .....	470
<b>FLORIDA COUNCIL FOR THE BLIND</b>	
Employees; salaries .....	371
Operators of vending stands	
Employees of Council .....	380
Federal Income Tax deductions .....	380
Workmen's Compensation liability .....	380
Vocational rehabilitation; agreements with Federal Government; authority .....	371
<b>FLORIDA CRIPPLED CHILDREN'S COMMISSION</b>	
Dependent child of serviceman; custody .....	375
Employees; military leave of absence; re-employment .....	168
<b>FLORIDA FOREST SERVICE</b>	
Fire control for school lands; Board of Education; liability .....	241
<b>FLORIDA GUIDE</b>	
Copyright royalties; disposition .....	265
<b>FLORIDA INDUSTRIAL COMMISSION</b>	
Destruction of records .....	379
Examination of employers' books .....	383
<b>FLORIDA INDUSTRIAL SCHOOL FOR BOYS</b>	
Transfer of funds between accounts .....	238
<b>FLORIDA PROBATE LAW</b>	
Distribution of estate; heir adjudged insane .....	487
<b>FLORIDA STATE COLLEGE</b>	
Demonstration School unit; rental by County Board .....	249
Oleomargarine; use in dining room .....	426
Scholarships; requirements .....	286
<b>FLORIDA STATE HOSPITAL</b>	
Board of Commissioners; Secretary; authority to execute lease of personal property .....	363
Commitment	
Acute alcoholism .....	360
Alien .....	359, 360
Alien internees .....	363
Maritime trainees .....	361
Nonresidents .....	365
Trainees of Military Force .....	364
Employment of minors; married females .....	395
Funds	
Board of Commissioners; authority to expend moneys .....	359
Patients, sale of produce, etc.; security; State Treasurer .....	171
Military Service; connected disabilities .....	364
Patients; custody and control .....	362
Transportation; insane prisoners .....	363

<b>FOODS, DRUGS<sup>1</sup> AND COSMETICS</b>	<b>Page</b>
Oleomargarine	
Coloring; importation .....	426
School lunchrooms .....	429
<b>FORESTRY AND PARKS, BOARD OF</b>	
County Fire Control Units; state aid; apportionment .....	456
Lost tools and equipment; payment by employees .....	452
Overflow of private lands; liability .....	453
Sale of lands; disposition of proceeds .....	455
State Agency; immunity from suit .....	453
Taxes for school or special tax school district bonds; payment .....	454
<b>FORMER ATTORNEYS GENERAL; LIST</b> .....	10
<b>FRATERNITY HOUSES</b>	
Taxation; exemption .....	195
<b>FUNDS</b>	
Auto theft refund; transfer to auto theft expense; disbursements .....	311
Board of Photographic Examiners; disposition .....	422
Cigarette Tax; transfer and expenditure by County Commis- sioners .....	184
Florida State Hospital; patients, produce, etc. ....	171
Race track	
Deficiencies .....	434
Replacement .....	436, 438
School; investment in U. S. War Bonds .....	269
State Prison Farm; produce; security; deposit .....	513
Transfer between accounts; Florida Industrial School for Boys .....	238
<b>FUNERAL DIRECTORS AND EMBALMERS</b>	
State Board examinations; certificates; issuance without required qualifications .....	411

## G

<b>GAIN TIME</b>	
Loss to prisoners because of self-injury .....	514
<b>GAMBLING</b>	
Confiscation of slot machines .....	491
Race horse machines .....	491
<b>GAME AND FRESH WATER FISH COMMISSION</b>	
Alligator hides; disposition by Court .....	327
Black bass; closed season in St. Johns River .....	328
Carrying firearms after dark .....	328
Court costs; payment upon conviction of Game and Fish Law violation .....	331
Fish in phosphate pits; control .....	330
Fresh and salt waters; lines of demarcation .....	327
Members; number .....	330
Oil interests; authority to lease .....	331
Private ponds and lakes; control .....	329
Purchase of land in Charlotte County .....	99
Value of leasehold; authority to stipulate .....	329
<b>GAME WARDENS</b>	
Arrests; mileage fees .....	332

<b>GASOLINE</b>	<b>Page</b>
Aviation; use in motor boat; taxability	234
Taxes	
Governmental Agencies; liability	234
State Road Distribution Fund; apportionment	322
<b>GOVERNMENTAL AGENCIES</b>	
Liability; gasoline, motor vehicle license tax	234
<b>GOVERNOR</b>	
Appointments; dual offices	257
Calling special election; procedure	142
Commissions; issuance	95
Death warrant; earliest date of issuance	500
Justice of the Peace; assignment	126
Messages	
To Special Session of Legislature	96
Powers	
Appointments; vacancies in elective offices	97
Appropriations; veto	98
Assignment; State Attorney to prosecute cases	122
Circuit Judge; disqualification; substitute	108
Drainage districts; audit of books; supervisors	106
Escambia County; assignment, Judge Court of Record to	
Criminal Court of Record	122
Military leaves of absence; Municipal Officers	169
Property; purchase for State Capitol Center	302
School districts; resignation of Trustee; successor	260
Removal or suspension	
Drainage District Supervisor	106
Officers during Session of Senate	97
Veto of appropriations	98
<b>GROSS PREMIUM INSURANCE TAX</b> see <b>INSURANCE COMPANIES</b>	
<b>GROUP INSURANCE</b> see <b>INSURANCE</b>	
<b>GUARDIANS</b>	
Applications and oaths; recording	306

## H

<b>HARDEE COUNTY</b>	
County Commissioners; clerical help	111
<b>HEALTH AND ACCIDENT INSURANCE</b>	
Classification	473
<b>HEALTH, BOARD OF</b>	
Anti-rabies campaign; authority	341
Birth certificates; sealed; opening	353
Emergency maternity and infant care plan; legality of amend-	
ment	347
Employees commissioned notaries public; payment of costs	344
Jails; inspection for sanitary condition	175
Masseurs	
Board members; expenses	423
Registration	424
Maternity and infant care	
Obstetrics; limitation on practice	346
Program; legality	347
Milk labeling; abandonment during emergency	345
Motor vehicles; purchase for venereal disease hospitals	343
Narcotic drug addicts; commitment to State Prison Hospital	365



<b>HEALTH BOARD OF (Continued)</b>	<b>Page</b>
Narcotic Drug Law; violations; jurisdiction of courts	367
Narcotic Inspectors; appointment, supervision, compensation and bond	366
Narcotics; wholesaler's license	367
Nonresident physicians	
Certification to Federal Bureau of Narcotics	348
Registration when employed by U. S. Health Service	344
Nuisances; landlord-tenant responsibility	357
State hospital; commitment of aliens	359
Tubercular persons; quarantine and isolation	351
Venereal disease; compulsory treatment	354, 355
Venereal disease hospitals	
Committing infected persons	349
Transportation of infected persons; payment of expense	352, 357
<b>HIGHWAY PATROL</b>	
Traffic arrests	316
<b>HOG CHOLERA SERUM AND VIRUS</b>	
Appropriation for purchase; effective date	449
Distribution	450
Livestock Sanitary Board; authority to order	450
Vaccination fees	451
<b>HOLIDAYS</b>	
Thanksgiving Day designation	483
<b>HOMESTEAD</b>	
Exemptions	
Allowance by County Commissioners; appeal from Tax Assessor's ruling	198
Annual claims; filing	197
Applications; filing	199
Military Force; yearly affidavits	199
Municipalities	199
Prerequisites for claiming	198
Reduction of homestead areas	240
Taxability for debt service	200
<b>HOSPITALS</b>	
Florida State	361, 362, 364, 365
Admittance of aliens	359, 360, 363
Jackson County Hospital Corporation; powers	191
Nonprofit service plan	476
Tuberculosis	
Indigent patients; residence requirements	358
Quarantine and isolation	351
Venereal disease	
Commitment; procedure	349
Motor vehicles; purchase	343
Patients; transportation	352
<b>HOTEL COMMISSION</b>	
Cafeterias for shipyard workers; licenses	429
Misdemeanors; prosecution	428
Restaurants operated at shipyards; jurisdiction	427
School lunchrooms; oleomargarine	429
<b>HOUSING AUTHORITIES</b>	
Area of operation	377
<b>HUNTING</b>	
Legality on Sunday	492

HUSBAND AND WIFE	Page
Common law marriage; change to legal marriage	488

## I

INDICTMENTS	
County Solicitor; Prosecuting Attorney; power to change	123
INDUSTRIAL COMMISSION see	
FLORIDA INDUSTRIAL COMMISSION	
INDUSTRIAL SCHOOL FOR BOYS see	
FLORIDA INDUSTRIAL SCHOOL FOR BOYS	
INFORMATIONS	
County Solicitor; Prosecuting Attorney; power to change	123
INSANE PERSONS	
Commitment to Florida State Hospital	
Acute alcoholism	360
Alien internee	363
Nonresident wife of British subject	360
Nonresidents	365
Criminals	
Out-of-state inmate; return transportation	363
Transportation to State Hospital	363
Inheritance rights	487
INSURANCE	
Agency defined	469
Agents' licenses	
Automobile dealers	465
Limited licenses; automobile dealers	468
Qualifications, etc.	469
Solicitor's license	467
Special and limited; examinations	468
Appearance bonds; aggregate for one defendant	478
Benevolent Mutual Benefit Associations	
Contracts; effective date	476
Nonprofit hospital service	476
Burial; conveyance of real estate in trust; release	475
Contingent mortality endowment contracts	472
Definitions	469
Effective date of policies	476
Foreign insurer; qualifying assets	463
Gross premium tax	231
Indemnity contracts	232
Group school bus drivers; payment from Teachers' Salary Fund	161
Health and accident; classification	473
Life; regulation, solicitation and sale	469
Mutual Fire Insurance Associations; citrus growers	471
Reciprocal; Florida Citrus Exchange	470
Sick and funeral benefits	
Classification may include health and accident	473
Duty of Commissioner	472
Territory defined	469
Workmen's Compensation; purchase by Parole Commission	379
INSURANCE COMMISSIONER	
Duty; sick and funeral benefit company	472
INSURANCE COMPANIES	
Foreign; qualification; assets previously pledged	463
Gross premium tax; indemnity contracts	232

<b>INTANGIBLE PROPERTY TAX</b>	<b>Page</b>
Distribution of money	221
Nonresident; taxability	222
<b>INTERNAL IMPROVEMENT FUND</b>	
Deeds and contracts; Documentary Stamp Tax, exemption	225
Lands	
Filled-in; title	292
Murphy; reversion of county lands to state	220
Payment of taxes levied for drainage	309
State; oil and mineral rights on exchange	292
Mineral, petroleum reservations, sale, release	295
Trustees' powers; sale of Murphy lands	202
<b>INTERNAL REVENUE AGENTS</b>	
Certified public accountants	
Certificates	
Classification	412
Without examination	413

## J

<b>JUDGES</b>	
Assignment	108, 122
Criminal Court of Record; qualifying; procedure	153
Juvenile Court; dependent and delinquent children; commitment	373
Municipal; authority to issue search warrants	501
<b>JUDICIAL DEPARTMENT</b>	13
<b>JUDGMENTS</b>	
Bonds, costs, etc.; Board of Administration; authority	325
Enforcement on absent defendant; criminal cases	499
Recording; procedure	114
<b>JURISDICTION</b>	
Civil and military courts, concurrent	495
County Judge's Court; Court of Record	125
Justice of the Peace	
Counties having Criminal Court of Record	126
Peace bond proceedings	130
Trial of misdemeanors	128
<b>JURORS</b>	
Fees; unlawful detainer suits	130
<b>JUSTICE OF PEACE</b>	
Assignment by Governor	126
Constable, Sheriff; right to serve process	129
Fees; committing magistrate	128
Jurisdiction	
Counties having Criminal Court of Record	126
Traffic violations	316
Trial of misdemeanors	128
Peace bond proceedings; venue	130
State Attorney; assignment to prosecute cases before	122
Surety bond; substitution for personal bond	163
Vacancy in nomination	158
<b>JUVENILE COURTS</b>	
Commitment of child; Children's Home; Child Placing Agency	373
Crippled child of serviceman; custody	375
Dependent or delinquent minors; jurisdiction after marriage	376
Trial of parents on school attendance charges	260

## L

<b>LABOR</b>	<b>Page</b>
City employees; union	391
Emigrant labor agents	393
Employee with two or more employers	381
Practice before Industrial Commission; regulation	383
Transfer of employment record	389
Work records; authority to copy	382
<b>LANDLORDS</b>	
Responsibility for sanitation; tenants	357
<b>LANDS</b>	
Board of Forestry and Parks; sale; disposition of funds	455
Public; development of petroleum and mineral interest	299
Sale; title vested in county	220
Seminole Indian Reservation; leasing, fencing, posting	304
Tax sale; procedure	211
<b>LEASES</b>	
Married women's property; joinder by husband or wife	484
Oil interests; authority of Game and Fresh Water Fish Commission	331
<b>LEAVES OF ABSENCE</b>	
Clerk, Circuit Court; Acting Clerk; powers	165
Employees entitled to leave	168
Military	
County officers	167
County Superintendent; substitute	167
Members of boards, etc.	168
Municipal Officers; Governor to grant	169
State and County officers	170
Teachers; principals; compensation	166, 171
Thirty days' pay	167, 168, 170, 171
Vacancy in office	255
<b>LEGAL RESIDENCE</b>	
Taxation basis	222
<b>LEGISLATORS</b>	
Revocation of resignations	93
<b>LEGISLATURE</b>	
Extraordinary Session; filling vacancies	142
Special Session; messages from Governor	96
<b>LEON COUNTY</b>	
Race track funds allocated; replacement	438
<b>LETTER OF TRANSMITTAL</b>	1
<b>LICENSE INSPECTORS</b>	
Board of Photographic Examiners; employment	422
<b>LICENSES AND LICENSE TAXES</b>	
Beauty culture teacher; additional	420
Beverages; Palm Beach County; determination	441
Cafeterias; classification; taxability	429
Chain store tax, additional; power of Comptroller to collect	228
Chauffeurs; issuance of temporary permit; minors	318
Chiropractic physicians; reciprocal	400
Cigarette permit fee; veterans	230
Circuses, shows; exhibition of animals	231
Emigrant labor agents	393



LICENSES AND LICENSE TAXES (Continued)	Page
Explosives; possessor	439
Growers; retail of own produce	233
Insurance agents	
Automobile dealers	465
Limited licenses; automobile dealers	468
Nonresidents	464
Solicitors	467
Special and limited	468
Marriage licenses; discretion in issuing in County Judge	488
Motor vehicles	
Army post exchange operating transportation line	312
Federal Government; lease to individuals, private corporations	313, 314
Governmental agencies; exemption	234
Nonresident military personnel	318
Nonresidents employed in the State	315
Purchase; Board of Health; for Venereal Disease Hospitals	343
Temporary license for replevied vehicle pending trial	311
Towed vehicles	360
Nurses; issuance	407
Optometry; revocation because of felony	402
Osteopaths; temporary licenses	400
Shows, circuses; traveling, tent, etc.; exhibition of animals	231
Side shows; freaks	234

## LIQUORS AND BEVERAGES

Forfeiture; sale	409
Hours of sale	444, 446
Manufacture of fruit spirits in dry counties	442
Municipalities; power to levy tax	443
Possession without license to sell	444
Sale to married minor	447
Seizure in dry county	445
Territory where sale permissible	443

## LIVESTOCK SANITARY BOARD

Hog cholera serum and virus	
Appropriation; effective date	449
Distribution	450
Vaccination fees	451

## M

## MADISON COUNTY

Race track funds allocated; replacement	438
---	-----

## MARITIME TRAINEES

Commitment to Florida State Hospital	361
--------------------------------------	-----

## MARRIED WOMEN'S PROPERTY

Leases; joinder by husband or wife	484
------------------------------------	-----

## MESSAGE REGISTRATION ACT

Beauticians who are not affected	418
----------------------------------	-----

## MASSEURS

Board members; traveling expense	423
Board of massage; inspection fees	424
Registration exemptions; bona fide citizens	423
Registration with Board of Health	424

<b>MATERNITY AND INFANT CARE</b>	<b>Page</b>
Emergency plan; legality of amendment	347
Legality of program	347
Obstetrics; limitation on practice	346
<b>MIDWIFERY</b>	
Naturopaths; authority to practice	401
<b>MILITARY DRILLS</b>	
Nonparticipation of pupil; suspension by County Board	248
<b>MILITARY FORCE</b>	
Absentee voting; registration; ballots	138
Cigarette tax exemption; post exchange; ship service store	223
Civil and military courts; concurrent jurisdiction	495
Confederate pensions	306
County prisoners; release for service	510
Dependent and delinquent children	
Allotment from service fathers; control, expenditures	376
Crippled child of service father; custody	375
Disabilities; responsibility	364
Divorce suits; proof by deposition	133
Elections; residence requirements	141
Electors; qualifications	144
Homestead exemptions; yearly affidavits	199
Leaves of absence	
Clerk, Circuit Court; acting clerk; powers	165
County Judge; substitute	164
County officials	167
Employees entitled to leave	168
Florida Crippled Children's Commission employees; re-employment	168
Municipal officers	619
School officials; effect on position	255
State and county officers	170
Teachers; principals; compensation	166, 171
Nonresident members; motor vehicle licenses	318
Nurses; payment of back fees after discharge	408
Registration as elector; power of attorney	145
Reregistration; Suwannee County	146
Teachers; contributions to Retirement System	273
University staff; teachers' retirement	277
Veneral disease; service rejection; enforced treatment	354, 355
Veterans' Guardianship Law	306
Voting; registration; absentee ballots	138
<b>MILK, CREAM AND MILK PRODUCTS</b>	
Labeling policy; abandonment during emergency	345
Oleomargarine	
Coloring; manufacture, sale	426
Service in school lunchrooms	429
State College; dining room	426
<b>MINERAL AND PETROLEUM RIGHTS</b>	
Sale, release; Trustees of Internal Improvement Fund	295
Tax assessments separate from real estate	206

<b>MINORS</b>	<b>Page</b>
Chauffeur's license; issuance during emergency	318
Dependent and delinquent	
Commitment by Juvenile Court	373
Control, expenditure; allotment from service fathers	376
Crippled child of service father; custody	375
Jurisdiction of Juvenile Court after marriage	376
Employment	
By wholesale liquor dealer	398
Milk delivery	396
Notaries public, appointment; removal of disabilities	173
<b>MISDEMEANORS</b>	
Prosecution by Hotel Commission	428
<b>MONUMENTS AND MEMORIALS</b>	
Warrants; issuance by Comptroller	298
<b>MORTGAGES</b>	
Partial assignments; Documentary Stamp Tax	227
<b>MOTOR VEHICLES</b>	
Auto theft expense fund; transfer from auto theft refund; disbursements	311
Automobile dealers; insurance agents	465
Department of Public Safety; director; authority	317
Drunken driving; prosecution	310
Licenses	
Army post exchange operating transportation line	312
Chauffeur's; issuance to minors	318
Federal Government; lease to individuals, private corporations	313, 314
Governmental agencies; license fee exemption	234
Municipalities; exemptions	287
Nonresident military personnel	318
Nonresidents employed in the State	315
Temporary; replevied vehicle pending trial	311
Purchase	
Board of Health; for Venereal Disease Hospitals	343
State Welfare Board	369
Recording satisfaction of lien; fee	312
Title certificates, issuance; purchaser of abandoned vehicle	312
<b>MULLET</b>	
Closed season; seizure, disposition	337
<b>MUNICIPAL OFFICERS</b>	
Military leaves of absence; Governor to grant	169
<b>MUNICIPALITIES</b>	
Auxiliary firemen, etc.; liability for injury	287
Corporate limits; contraction, extension	193
County jail; use	175
Employees; labor unions	391
Homestead exemption	199
Reduction of area	240
License	
Grower; retail of own produce	233
Tags; exemptions	287
Murphy lands; sale; state's interest	204
Powers; agreements with trade union	391
Search warrants; authority of Municipal Judge to issue	501
Tax on beverages; power to levy	443

<b>MURPHY LANDS</b>	<b>Page</b>
Cancellation of certificates	217
Conveyance of title to church	201
County owned; reversion to state	220
Disclaimer of title	200, 202
Former owner; right to disclaimer	203
Leased to United States; Trustees Internal Improvement Fund; authority	294
Resale	202
Restrictions on lots; action to remove	195
Sale; refund of a portion of the consideration	204
Sale by municipalities; state's interest	204
Sale or lease; oil, mineral rights	205
Tax sale certificates	
Redemption	219
Vesting of title in state	217
Title of mortgagor	203

## N

<b>NAMES</b>	
Fictitious; registration; cancellation	493
<b>NARCOTIC DRUG LAW</b>	
Addicts; commitment to Hospital at Raiford	365
Inspectors; supervision	366
Violations; jurisdiction of courts	367
Wholesaler's license; requirements	367
<b>NATUROPATHS</b>	
Educational requirements; constitutionality	401
Midwifery; authority to practice	401
Prescription for lenses	402
<b>NEPOTISM STATUTES</b>	
Waiver by Governor	121
<b>NETS</b>	
Fishing; illegal use; seizure, disposition	336
Salt water fisheries; force trap nets	335
<b>NONPUBLIC SCHOOLS</b>	
Use of state-owned textbooks	261
<b>NOTARIES PUBLIC</b>	
Citizenship prerequisite to appointment	172
Minors, appointment; removal of disabilities	173
Use of assumed name	173
<b>NURSES AND NURSING</b>	
Aliens; immigrants; registration	409
Board of Examiners	
Compensation of members	405
Diplomas; issuance; licenses	407
Examinations; quorum required	406
Expense vouchers, requisitions; signatures	407
Inspection expenses of members; payment	409
Issuance of temporary permit to alien	408
Nonmembers; presence at meeting	406
Examinations	
Age requirements	404
Graduation requirements	407
Fees; payment after discharge from military service	408
Licenses, issuance; prescribed training period	407
Training schools; inspection	409



## O

<b>OBSTETRICS</b>	<b>Page</b>
Limitation on practice; Board of Health	346
<b>OFFICE OF ATTORNEY GENERAL</b>	<b>2</b>
<b>OFFICES AND OFFICERS</b>	
Civil Service Board; dual office	161
Everglades Fire Control District; expenditures; building construction	173
Fees; Tax Assessors, Collectors	214
Game and Fresh Water Fish Commission; membership; number	330
Leaves of absence	
Acting County Commissioners; appointment	164
Clerk, Circuit Court; powers of acting Clerk	165
County Superintendent; substitute	167
Military; compensation	167
Notaries public	
Citizenship prerequisite	172
Use of assumed name	173
Powers and duties of officers	121
Removal or suspension by Governor during Session of Senate	97
State Attorneys; salaries	109
<b>OIL AND GAS LEASES</b>	
Game and Fresh Water Fish Commission; authority	331
<b>OIL AND MINERAL RIGHTS</b>	
Reservation; exchanged lands	292
<b>OKEECHOBEE COUNTY</b>	
Tax Collector; commissions; effect of general and special acts	213
<b>OLD AGE ASSISTANCE</b>	
State Welfare Board; payment by Comptroller	372
Warrants; cancellation, reissuance	373
<b>OLEOMARGARINE</b>	
Coloring; importation, manufacture, sale	426
School lunchrooms	429
<b>OPTICIANS</b>	
Prescriptions by nonresident optometrists	403
<b>OPTOMETRISTS</b>	
Licenses; revocation upon conviction of felony	402
Nonresidents; prescriptions	403
<b>OPTOMETRY</b>	
Prescription of lenses by naturopathic physicians	402
State Board members; traveling expenses	404
<b>OSTEOPATHS</b>	
Licenses; temporary for duration	400
<b>OVERSEAS ROAD AND TOLL BRIDGE DISTRICT</b>	
Commission members; dual office	257
Deposit of funds; security	105

## P

<b>PALM BEACH COUNTY</b>	<b>Page</b>
Beverage license; determination	441
Special census; effect on population laws	192
<b>PARDON BOARD</b>	
Authority to commute sentences	503
Pardons; partial or limited	506
Paroles; restoration of civil rights	505
Power to revoke paroles	508
<b>PARDONS, PAROLE AND PROBATION</b>	
Civil rights, restoration; Pardon Board	506
Eligibility for parole	506
Parolee supervision out-of-state	508
Release for military service	510
Self-injury; loss of gain time	514
Termination conditions; supervision; restoration of civil rights	505
<b>PAROLE COMMISSION</b>	
Fine; payment prior to parole	507
Pardons; termination conditions; supervision; restoration to civil rights	505
Parole revocation hearings; Sheriff's fees	118
Uniform acts; out-of-state supervision; Interstate Extradition Acts	508
<b>PENSIONS</b>	
Confederate soldier's widow, under forty, eligibility after re-marriage	306
Payment; estate of deceased Confederate veteran	306
Teacher; fund from which pension is paid	275
Widows; Teachers' Retirement System beneficiary	271
<b>PERMITS</b>	
Foreign corporations, having same name	462
<b>PHARMACISTS</b>	
Florida State Board of Pharmacy; authority to execute contract	284
<b>PHOTOGRAPHERS</b>	
Board of Examiners; funds; disposition	284
License inspectors; compensation	422
<b>PHYSICIANS</b>	
Nonresident	
Certification; Federal Bureau of Narcotics	348
Registration	344
<b>POLITICAL PARTIES</b>	
Assessments	
Disposition; Secretary of State	140
Members of Legislature	140
Qualification of members	145
<b>POLK COUNTY</b>	
Budget Commission; jurisdiction	208
<b>PORT COMMISSIONERS</b>	
Candidates; error in qualification	155
<b>POSTWAR PLANNING</b>	
County Commissioners; reserve fund	181

<b>POULTRY</b>	<b>Page</b>
Slaughter establishment; state supervision	452
<b>PRESIDENTIAL ELECTORS</b>	
Nomination	157
<b>PRIMARY ELECTIONS</b>	
Transfer of reregistration of electors	147
<b>PRISON FARM</b>	
Funds derived from produce; security; deposit	513
<b>PRISONERS</b>	
Civil rights; restoration	505
County; equipment for feeding	511
County Judge's Court; jurisdiction	125
Pardons; supervision; restoration of civil rights	505
Parole; eligibility	506
Self-injury; loss of gain time	514
Transportation expenses; Sheriffs	116
<b>PROCESS</b>	
Service by county traffic officer	117
<b>PROFESSIONS AND VOCATIONS</b>	
Basic Science Law	399
Aliens; examination	399
Beauty culture	192, 414, 420, 424
Barber; employment in salon	416
Beautician; prerequisites, qualifications	415
Certificates; fees	417
Junior operator	417
Certificate; misrepresentation	418
Permit to nonresident	419
Licenses	420
Manicuring and pedicuring	419
Massage registration act; effect	418
Nurse; employed in salon	416
Shops; sale of gifts, etc.	420
Teachers	
Payment	421
Prerequisites for certificate	421
Chiropodists; authority to prescribe narcotic drugs	401
Chiropractors; licenses; reciprocal	400
Dentists; dentures; supply	410
Embalmers; licenses	411
Funeral directors; licenses	411
Licenses	
Accountants	413
Beauty culture	192, 415, 419, 421
Chiropractors	410
Dentists	410
Emblamers	411
Nurses	407
Optometrists; revocation	402
Osteopaths	400
Manicurists; permits	420
Masseurs	
Board members; travelling expenses	423
Citizenship; registration, etc.	423
Inspector's fees	424
Massage registration act; effect	418
Registration fee	424

<b>PROFESSIONS AND VOCATIONS (Continued)</b>	<b>Page</b>
Midwifery; naturopaths .....	401
Naturopaths	
Authorized to practice midwifery .....	401
Educational requirements; constitutionality .....	401
Prescription of lenses .....	402
Nurses and nursing	
Age requirements .....	404
Aliens	
Immigrants; registration .....	409
Temporary permits .....	408
Board of examiners	
Compensation .....	405
Expenses .....	407
Presence of nonmembers .....	406
Examinations; quorum .....	406
Fees; payment after discharge from military service .....	408
Requirements for graduation .....	407
Training schools; inspection .....	409
Optometrists	
Licenses; revocation upon conviction of felony .....	402
Prescriptions by nonresidents .....	403
State Board members; traveling expenses .....	403, 404
Osteopaths; licenses .....	400
Pedicurists; permits .....	420
Permits; beauty culture .....	419
Photographers; license inspectors; compensation .....	422
Public accountants	
Certificates without examination .....	413
Internal Revenue Agents .....	412
Practicing without certificates .....	412
<b>PROSECUTING ATTORNEYS</b>	
Authority to file informations .....	498
Power; changing, reducing criminal charges .....	123
<b>PROXY</b>	
Candidates for office, in military force; oath required .....	154
Marriages; by mail; validity .....	489
<b>PUBLIC ACCOUNTANTS</b>	
Practicing without certificates .....	412
<b>PUBLIC BUSINESS</b>	
Governor; authority to purchase property for State Capitol Center .....	302
Insurance; bridges on state highways .....	304
<b>PUBLIC FUNDS</b>	
Board of Administration; investments .....	323
Comptroller; issuance of warrant; erroneous condemnation of roads .....	321
Overseas Road and Toll Bridge District; security; deposit .....	105
Securities .....	103
State Road Department; investments .....	321
<b>PUBLIC HEALTH see HEALTH</b>	
<b>PUBLIC LANDS</b>	
Assessment; delivery of deed by Trustees Internal Improvement Fund .....	296
Conveyance of lands and jurisdiction to United States .....	296
Filled-in lands; title .....	292
Mineral, petroleum interests; development .....	299



<b>PUBLIC LANDS (Continued)</b>	<b>Page</b>
Mineral, petroleum rights	
Exchange	292
Sale or release	295
Murphy lands; resale	202
Quitclaim deed; property reserved for drainage purposes	300
Reconveyance by Trustees when erroneously conveyed	294
Title to island in navigable stream	301

<b>PUBLIC RECORDS</b>	
Disposition; State Board of Accountancy	414

<b>PUBLIC SAFETY, DEPARTMENT OF</b>	
Director; authority	317
Drivers' license division; supervision	317
Highway patrolmen; arrests, procedure	316

<b>PUPILS</b>	
Military drills; nonparticipation; suspension	248

<b>PURE FOOD AND DRUG LAWS</b>	
Oleomargarine; sale	426

## Q

<b>QUARANTINE</b>	
Tubercular persons	351
Venereal Disease Hospitals	
Commitment; procedure	349
Motor vehicles; purchase	343
Patients; transportation	352, 357

## R

<b>RACE TRACK FUNDS</b>	
Deficiency; replacement	434, 437
Replacement	436, 438

<b>REAL AND PERSONAL PROPERTY</b>	
Assessments; mineral rights separate	206
Married women; joinder by husband or wife in lease	484

<b>RECORDING</b>	
Clerk, Circuit Court; deeds	115

<b>RECORDS</b>	
Board of Administration; consolidation of investment accounts	324
Destruction; Industrial Commission	379

<b>REFUNDING</b>	
Bonds; payment of fee	241
Resolutions; notes	269

<b>REFUNDS</b>	
Beauty culture; fees; examination, certificate	417
Capital Stock Tax	459
Unemployment Compensation Law	385

<b>REGISTRATION</b>	
Deputy officers; fees, registering of elector	147
Precinct officers; fees, registering of elector	147

<b>REGULATION OF TRADE, COMMERCE AND INVESTMENTS</b>	<b>Page</b>
Beer, refusal of wholesalers to sell to retailers	434
Bonds; securities; substitution	431
Explosives	
Licensing agencies; government	439
State Treasurer; Fire Marshal	439
Oleomargarine; coloring, importation, service	426
Restaurants; defense projects	429
School lunchrooms; oleomargarine; coloring, etc.	429
Securities Commission; definitions	432
Securities; unregistered and nonexempt; sale	434
Shipyards; Hotel Commission; jurisdiction	427
<b>REMOVAL OF OFFICERS</b>	
Drainage districts	106
During Session of Senate	97
<b>REPEALED STATUTES</b>	
Effect on appropriations	302
<b>REPORTS OF STATE ATTORNEYS</b> see	
<b>STATE ATTORNEYS, REPORTS OF</b>	
<b>RESTAURANTS</b>	
Cafeterias for shipyard workers; license	429
Operation at shipyards; jurisdiction of Hotel Commission	427
School lunchrooms; service of oleomargarine	429
<b>RETIREMENT SYSTEM</b>	
Teachers; reinstated members	278
<b>RIPARIAN RIGHTS</b>	
Title to island in navigable stream; Trustees Internal Improvement Fund	301
<b>ROAD FUNDS</b>	
Federal aid; deposit by State Treasurer	101
<b>ROAD PATROLS</b>	
Arrests; Sheriff's fee	117

## S

<b>SALARIES</b>	
County Board of Public Instruction, member; legality of salary claim	251
County Superintendent of Public Instruction; computation	257
Florida Council for the Blind; employees	371
State Attorneys; effect of subsequent statute	109
State Welfare Board, employees; limitation	372
Superintendents and heads of State Institutions	303
<b>SALT WATER FISHERIES</b>	
Closed season	
Crawfish	333
Mullet	337
Taking, for use in war effort	338
Fish brought into Florida for processing and shipment	333
Seafood dealers; additional license tax	338
Sponges less than five inches in diameter	334, 339
<b>SCHOOL DISTRICTS</b>	
Consolidation; special election	263
Elections; procedure	264
Tax Collector's commission; deductions	212
Trustees; resignations, appointment of successors	260

<b>SCHOOL FUNDS</b>	<b>Page</b>
Investment in U. S. war bonds	269
<b>SCHOOL LANDS</b>	
College fraternity houses; tax exemptions	195
Fire control service; Board of Education; liability	241
<b>SCHOOLS</b>	
Attendance	
Child labor	396
Trial of parents	260
Board member; payment for driving school bus	262
Budget Commission; powers and duties	251
Buildings and grounds; use for other purposes	243
Busses; purchase	271
Cafeterias operated by P.-T. A. and County Boards; liability under Workman's Compensation Act	378
County Superintendent of Public Instruction	
Liability; countersigning certain warrants	262
Nonparticipation of student in flag salute	256
Office hours	251
Right to hold municipal office	251
Salary; computation	257
Death of student; liability of County Board	247
Finances; adoption of budget	267
Flag salute; pledge of allegiance	256
Lunchrooms	
Oleomargarine	429
Responsibility	253
Military drills; suspension for nonparticipation	248
Nonpublic; use of state-owned textbooks	261
Officials; effect of military service	255
Pensions	275
Pupils of parochial schools; transportation in county school busses	262
Refunding bonds; payment of fee	241
Refunding indebtedness; notes	269
Refunding resolutions; notes	269
Retirement System for Teachers; reinstated members	278
Students; pledge of allegiance to flag	256
Teachers; payment of accumulated sick leave	258
Teachers' certificates; revocation; form of notice	258
Teachers, principals; military leaves of absence; salary	171
Teachers' Retirement System	
Beneficiary; widow's pension	271
Candidate for County Board member	283
Disbursement of nonresident member's contribution	274
Employment when over seventy	275, 276
Members	
Examinations by Medical Board; fees	276
Of the University of Florida staff	277
Membership; eligibility	273, 279
Military service; contributions	273
Prior service credit	280
Teaching in foreign country	282
Reinstated members	278
Service credit	
County Superintendent	280, 281
Substitute teacher	281
Teachers' salary fund	
Group insurance for bus drivers	161
Repayment of loan to Pasco County Board	437
Transfer of unexpended balance	264

<b>SCHOOLS (Continued)</b>	<b>Page</b>
Textbooks; adoption for use of pupils .....	261
Trustees	
Election; procedure .....	259
Local school district; County Board; appointment of successor .....	260
Supervision, buildings, grounds; use for other purposes .....	243
<b>SEARCH AND SEIZURE</b>	
Disposition of mullet .....	337
Fishing nets .....	336
<b>SECRETARY OF STATE</b>	
Ballots; marking .....	148
Fees; Civil Service Board .....	162
Receipt of incoming Treasurer; form .....	104
Return of commission tax; cancellation, County Officer's bond .....	162
<b>SECURITIES</b>	
Definition; effect of Supreme Court decision .....	430
Maturity; extension .....	481
Public funds; securing deposits .....	103
Sales	
State Treasurer; evasion of law .....	431
Unregistered; nonexempt .....	434
<b>SECURITIES COMMISSION</b>	
Bonds; substitution .....	431
Definitions .....	432
<b>SECURITY</b>	
State funds; State Treasurer .....	100
<b>SELECTEES see MILITARY FORCE</b>	
<b>SEMINOLE INDIAN RESERVATION</b>	
Broward County lands; leasing, fencing, posting .....	304
<b>SENATORIAL STATE SCHOLARSHIPS</b>	
State College; requirements .....	286
<b>SERVICEMEN see MILITARY FORCE</b>	
<b>SHELL FISH</b>	
Power of Conservation Board to extend open season .....	339
<b>SHERIFFS</b>	
Arrests by highway patrolmen; procedure .....	316
Criminal investigations .....	119
Deceased; election of successor .....	141
Duties; jail sanitation .....	175
Elections; appointment of deputies .....	137
Expenses; returning prisoners to Florida .....	116
Fees	
Approving bail bond .....	495
Criminal investigations .....	119
Mileage .....	116, 120, 189
Parole revocation hearings .....	118
Person detained under writ of ne exeat .....	133
Returning prisoners	
From another county .....	120
To Florida .....	116
Warrants for taxes; execution .....	387
Investigation of crime; approval, bill for services .....	119
Justice of the Peace Courts; right to serve process .....	129



<b>SHERIFFS (Continued)</b>	<b>Page</b>
Nepotism statutes; application	121
Traffic arrests	117
Transportation of prisoners; fees	116, 120
Transportation of venereal patients; mileage	121
Vacancy in office; appointment by Governor	97
<b>SHOWS AND CIRCUSES</b>	
License taxes; exhibition of animals	231
<b>SOCIAL WELFARE</b> see <b>STATE WELFARE BOARD</b>	
<b>SOLDIERS AND SAILORS</b> see <b>MILITARY FORCE</b>	
<b>SOVEREIGNTY LANDS</b>	
Lands below high water mark; title	292
<b>SPECIAL CENSUS</b>	
Palm Beach, Broward Counties; effect on population laws	192
<b>SPONGES, TAKING</b>	
Maximum diameter	339
<b>STATE AGENCIES</b>	
Immunity from suit	453
<b>STATE ATTORNEYS</b>	
Assistant; authority to file information	109
Duties; appeals in criminal cases	108
Misdemeanors; prosecution	428
Reports of	
Circuits	
First	17
Second	19
Third	23
Fourth	27
Fifth	28
Sixth	31
Seventh	33
Eighth	36
Ninth	40
Tenth	43
Eleventh	45
Twelfth	46
Thirteenth	50
Fourteenth	51
Fifteenth	54
Counties	
Alachua	36
Baker	37
Bay	51
Bradford	37
Brevard	40
Broward	54
Calhoun	51
Charlotte	46
Citrus	28
Clay	27
Collier	47
Columbia	23
Dade	45
DeSoto	47
Dixie	23
Duval	27

STATE ATTORNEYS (Continued)	Page
Escambia .....	17
Flagler .....	33
Franklin .....	19
Gadsden .....	20
Gilchrist .....	38
Glades .....	48
Gulf .....	52
Hamilton .....	24
Hardee .....	43
Hendry .....	48
Hernando .....	29
Highlands .....	44
Hillsborough .....	50
Holmes .....	52
Indian River .....	40
Jackson .....	53
Jefferson .....	20
Lafayette .....	25
Lake .....	29
Lee .....	49
Leon .....	21
Levy .....	38
Liberty .....	22
Madison .....	25
Manatee .....	49
Marion .....	30
Martin .....	41
Monroe .....	46
Nassau .....	28
Okaloosa .....	17
Okeechobee .....	41
Orange .....	41
Osceola .....	42
Palm Beach .....	55
Pasco .....	31
Pinellas .....	32
Polk .....	44
Putnam .....	33
St. Johns .....	34
St. Lucie .....	42
Santa Rosa .....	18
Sarasota .....	50
Seminole .....	43
Sumter .....	31
Suwannee .....	26
Taylor .....	26
Union .....	39
Volusia .....	35
Wakulla .....	22
Walton .....	19
Washington .....	53
Salaries; effect of subsequent statute .....	109
STATE BEVERAGE DEPARTMENT	
Cigarette Tax; disposition of funds .....	236
STATE BUREAU OF NARCOTICS	
Inspectors .....	366
STATE CENSUS	
Special; effect on population acts .....	192

<b>STATE CHAMBER OF COMMERCE</b>	<b>Page</b>
Memberships acquired by Treasury Department	102
<b>STATE COURT</b>	
Jurisdiction; crimes on federal lands	91
<b>STATE DEMOCRATIC EXECUTIVE COMMITTEE</b>	
Presidential electors; nomination	157
<b>STATE DEPOSITORS</b>	
Security	100
<b>STATE EMPLOYEES</b>	
Notaries public; payment of costs	344
Salaries	304
Wages; tax, unemployment compensation	382
Witness fees; mileage	498
<b>STATE FIRE MARSHAL</b>	
Explosives; possessor's license	439
<b>STATE FUNDS</b>	
Board of Administration; investments	323
Deposit; security; State Treasurer	100
Duplicate warrants; responsibility of Comptroller and Treasurer	98
Investment in victory bonds	237
State Library; money received; depositing	296
State Road Department; investments	321
Transfer; General Revenue Fund to State Board of Beauty Culture Fund	237
<b>STATE HIGHWAYS</b>	
Bridges; insurance	304
<b>STATE HOSPITAL see FLORIDA STATE HOSPITAL</b>	
<b>STATE INSTITUTIONS, BOARD OF COMMISSIONERS OF</b>	
Authority to expend moneys	359
Holding title to copyrights	265
Lease of personal property; authority of Secretary to execute	363
Salaries	
State employees	304
Superintendents of State Institutions	303
Seminole Indian Reservations; leasing, fencing, posting	304
State Hospital; custody and control of patients	362
State Prison Farm; sale of personal property	512
<b>STATE LANDS</b>	
Oil and mineral rights on exchange	292
Sale by municipalities of Murphy lands; state's interest	204
Taxability of school lands	309
Taxation; exemptions	206
<b>STATE LAW DEPARTMENT</b>	11
<b>STATE LIBRARY</b>	
Moneys received; how deposited	296
<b>STATE LIVESTOCK SANITARY BOARD</b>	
Appropriation; when available	238
Authority to pay claim; extermination tick-infested deer	449
Hog cholera serum and virus	
Appropriation; effective date	449
Appropriation; July 1, 1944	450
Distribution	450
Vaccination fees	451
Meat-producing animals; poultry	452

<b>STATE MARKETING BUREAU</b>	<b>Page</b>
Mileage; Federal-State employees	457
<b>STATE PARDON BOARD</b>	
Fine; payment prior to parole	507
<b>STATE PRISON</b>	
Prisoner; term of imprisonment, commencement	501
<b>STATE PRISON FARM</b>	
Funds derived from produce; security; deposit	513
Sale of personal property; cattle, hogs	512
<b>STATE ROAD DEPARTMENT</b>	
Federal Government; erroneous condemnation	321
Funds; investments	321
<b>STATE ROAD DISTRIBUTION FUND</b>	
Gas tax funds; apportionment	322
<b>STATE SUPERINTENDENT OF PUBLIC INSTRUCTION</b>	
Authority; agreements on behalf of Board	242
<b>STATE TREASURER</b>	
Court registry funds; unclaimed moneys; procedure	100, 132
Escheated estates; disposition	101
Federal aid road funds; deposit	101
Fire marshal see <b>STATE FIRE MARSHAL</b>	
Florida State Hospital funds; securing deposits	171
Memberships in State Chamber of Commerce	102
Old age assistance warrants; cancellations, reissuance	373
Public funds; securities acceptable	103
Receipt of incoming Treasurer mandatory; form	104
Sale of securities; evasion of law	431
State funds; deposit, security	100
Trust companies; deposited securities	482
Warrants on Teachers' Salary Fund; group insurance; school bus drivers	161
<b>STATE TUBERCULOSIS SANATORIUM</b>	
Colored female convicts; use for work	512
<b>STATE WARRANTS</b>	
Duplicate; responsibility of Comptroller, Treasurer	98
<b>STATE WELFARE BOARD</b>	
Children; care; expenditures	369
Council for the Blind	
Agreements	371
Employees; salary limitations	372
Motor vehicles; purchase	369
Salaries	371
Funds; use for care of dependent children	370
Housing Authorities; area of operation	377
Old age assistance	
Payment by Comptroller	372
Warrants; cancellation, reissuance	373
<b>STOCK</b>	
Capital Stock Tax	459
Exchange of shares; evasion of Securities Law	431
Transferred; Documentary Stamp Tax	228
<b>SUMTER COUNTY</b>	
Board of Commissioners; money for repairs	178



<b>SUNDAY</b>	<b>Page</b>
Hunting; legality	492
<b>SUPERVISORS OF REGISTRATION</b>	
Ballots for voting machines	147
Official seal; certificates	148
Political parties; members; qualification to register	145
Registration; Military Force; power of attorney	145
Registration in ceded territory	145
<b>SUPREME COURT</b>	
Decision; effect on definition of securities	430
<b>SURETY BONDS</b>	
Substitutions, personal bond; Justice of the Peace	163
<b>SURETY COMPANIES</b>	
Appearance bonds; aggregate for one defendant	478
<b>SUWANNEE COUNTY</b>	
Military Force; reregistration	146

## T

## TAXATION

Advertisement	
Delinquent tax lists	208
Omission of property from tax sale notice	209
Assessments	
Closing of books	211
Construction of new courthouse	207
Mineral rights separate from real estate	206
Public lands conveyed by Trustees Internal Improvement Fund	296
Capital Stock Tax	459
Exemption	458
Refund	459
Chain Store Tax additional; Comptroller's power to collect	228
Cigarette Tax	
Disposition of funds	236
Military Force; exemption	223
Commissions	
Assessors	209, 214, 215
Collectors	212, 214, 215
Compensation for unofficial work	210
County budgets	208
Courthouse; construction	207
Debt service; taxability of homesteads	200
Delinquent tax lists; advertisement	208
Documentary Stamp Tax	225
Excise taxes	
Cigarette	
Exemption	223
Permit fee; veterans	230
Documentary stamp	223, 225, 226, 227, 228
Deeds to and from state	225
Forthcoming bonds	227
Gross premium insurance	231
Fees; Tax Assessors, Collectors	214
Final reports; Tax Collectors	213
Foreclosure by county	200, 218
Fraternity houses; exemptions	195

TAXATION (Continued)	Page
Gasoline	
Aviation; use in motor boat; taxability	234
Governmental Agencies; taxability	234
Governmental Agencies; exemptions	234
Gross Premium Insurance Tax	232
Homestead exemptions	
Allowance, County Commissioners; appeal	198
Application; filing	199
Filing annual claims	197
Military Force; yearly affidavits	199
Municipalities	199
Prerequisites for claiming	198
Insurance contracts; Gross Premium Tax	232
Intangible Tax	
Distribution of money	221
Manufacturing company; subsidiary	222
Nonresident liability	222
Power of appointment	458
Lands, title vested in county; sale	220
Legal residence	222
License taxes	
Additional; seafood dealers	338
Circuses; shows, animals	231
Grower; retail of own produce	233
Insurance premiums	231
Motor vehicles; governmental agencies	234
Side shows; freaks	234
Towed vehicles	360
Liens; Everglades Drainage District	196
Municipal taxes	200
Murphy lands	
Action to remove restrictions	195
Cancellation of certificates	217
Certificates; redemption	219
Conveyance of title to church	201
County lands; reversion to state	220
Disclaimer of title	200, 202, 205
Former owner; right to disclaimer	203
Leased to United States	294
Redemption	219
Restrictions on lots; action to remove	195
Sale; consideration; refund of portion	204
Sale or lease; oil, minerals	205
Title of mortgagor	203
School district bond assessments; Board of Forestry and Parks	454
State lands; exemptions	206
State school lands; taxability, drainage	309
Tax Assessors	
Commissions	209, 214, 215
Compensation for unofficial work	210
Fees	214
Homestead exemption; appeal from ruling	198
Tax books; closing date	211
Tax Collectors	
Commissions	212, 213, 214, 215
Deposit of county funds	187
Exchange on checks	483
Fees	214
Final reports	213

<b>TAXATION (Continued)</b>	<b>Page</b>
Tax sale certificates	
Cancellation; reasons .....	217
County-owned .....	218
County tax liens; foreclosure proceedings .....	218
Purchasers .....	211
Tax sales	
Advertisement	
Delinquent tax list .....	208
Omission of property .....	209
Tax warrants; costs, posting bond, recording .....	387
Unemployment Compensation Tax; collection; nonresident .....	388
<b>TAXPAYERS</b>	
Payments; exchange on checks .....	483
<b>TEACHERS see SCHOOLS</b>	
<b>TENANTS</b>	
Responsibility for sanitation; landlords .....	357
<b>TEXTBOOKS</b>	
State-owned; use in nonpublic schools .....	261
<b>THANKSGIVING DAY</b>	
Designation .....	483
<b>TITLE CERTIFICATES</b>	
Motor vehicles, issuance; purchaser, abandoned vehicle .....	312
<b>TORT</b>	
County Board of Public Instruction; liability for death of student .....	247
<b>TRANSFER OF FUNDS</b>	
Florida Industrial School for Boys; between accounts .....	238
<b>TRANSMITTAL, LETTER OF</b> .....	1
<b>TREASURER</b>	
Duplicate warrants; responsibility; bond .....	98
<b>TRUSTEE</b>	
Local school district; County Board; appointment of successor .....	260
<b>TRUSTEES INTERNAL IMPROVEMENT FUND</b>	
Disclaimer of title .....	200, 203
Disclaiming title, interest in land .....	201
Murphy lands; leased to United States .....	294
Power to convey land and jurisdiction to United States .....	296
Quitclaim deed to property reserved for drainage purposes .....	300
Reconveyance of lands erroneously conveyed .....	294
Title to island in navigable stream; riparian rights .....	301
<b>TUBERCULOSIS SANATORIUM</b>	
Admission	
Residence requirements .....	358
Semi-indigent patient; without approval of county .....	358

## U

<b>UNEMPLOYMENT COMPENSATION LAW</b>	<b>Page</b>
Contributions; collection, nonresident	388
Delinquent assessments; collection in other states	388
Employee with two or more employers	381
Employees; wage; state tax	382
Examination of employers' books; Industrial Commission	383
Practice before Commission; regulation	383
Refunds; adjudication and payment	385
Tax warrants; costs, posting bond, recording	387
Transfer of employment record	389
Work records; authority to copy	382
<b>UNIVERSITY OF FLORIDA</b>	
Appropriation for Seagle Building	285
Fraternity houses; taxation, exemption	195
Staff members; prior service credit	277

## V

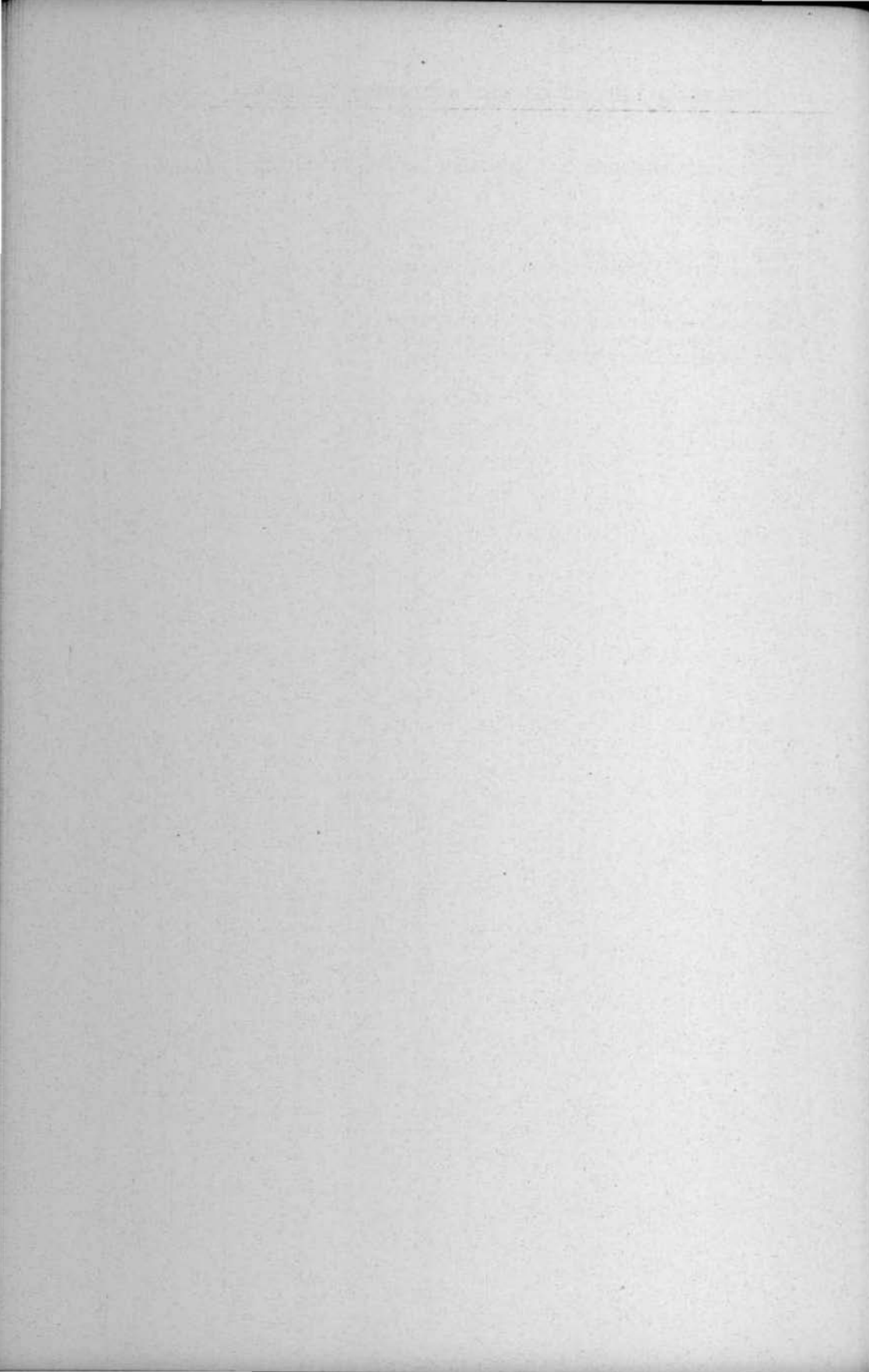
<b>VENEREAL DISEASES</b>	
Compulsory treatment; prosecution	354
Military Force; service rejection; enforced treatment	354, 355
Quarantine hospitals	
Commitment; procedure	349, 353
Purchase of motor vehicles	343
Transportation of infected persons; payment	352, 357
<b>VENUE</b>	
Peace bond proceedings	130
<b>VETERANS</b>	
Guardianship Law; proceedings; fees	306
Rehabilitation; employment of County Service Officers by County Commissioners	183
<b>VICTORY BONDS</b>	
County school funds; investment	269
State funds; investment	237
<b>VITAL STATISTICS</b>	
Birth certificates; sealed; opening	353
<b>VOTING</b>	
Absentee; Military Force, registration; war ballots	138
Machines; custodians	152
Qualifications of electors; Military Force	144
Suwannee County; Military Force; reregistration	146
Validity in ceded territory	145

## W

<b>WAR BALLOTS</b>	
Absent voters; affidavit required	152
Vacancy in nomination; filling	160
<b>WARRANTS</b>	
Old age assistance; cancellation, reissuance	373
Teachers' Salary Fund; payment, group insurance; school bus drivers	161
<b>WAR VETERANS</b>	
Guardianship Law; fees	306
Rehabilitation; employment of County Service Officers by County Commissioners	183



WIDOWS	Page
Under forty; eligibility for confederate pension after remarriage	306
WITNESSES	
State employees; fees	498
WOMEN'S ARMY CORPS	
Beauty shops; jurisdiction of State Board	416
WORKMEN'S COMPENSATION LAW	
Cafeterias operated by P. T. A., County Boards; liability	378
Florida Council for the Blind; employees	380
Parole Commission; purchase of insurance	379



# INDEX

## Part Two

### INDEX TO THE CONSTITUTION AND LAWS OF FLORIDA CONSTRUED OR CITED IN OPINIONS IN BIENNIAL REPORT 1943-1944 CONSTITUTION OF 1885

	Section	Page
Declaration of Rights	6	262
	10	109, 123
	12	321
	14	189
	16	126
Article	Section	Page
III	2	96, 142
III	4	140
III	6	141
III	20	136, 214
III	21	136, 214
III	24	136
IV	1	164, 331
IV	6	164
IV	7	97, 141
IV	8	96, 142
IV	11	96, 331
IV	12	331, 503, 505, 506, 510
IV	14	255
IV	15	106, 108
IV	18	98
IV	24	101
IV	30	329, 330, 331, 492
IV	30 (1)	328
V		383
V	15	110, 111
V	18	123
V	22	126
V	27	123
V	31	122
V	36	119
V	39	122
V	41	122
V	45	192
V	45 (c)	192
VI	4	510
VI	45	441
VII	5	192, 441
VIII	5	180, 183
VIII	6	110, 178
VIII	7	95
IX		434
IX	1	196
IX	4	162, 275
IX	9	217
IX	11	382
IX	12	459
IX	13	215

Article	Section	Page
IX	16	103, 186, 322, 323, 325
X	1	484
X	7	198
XII		247, 265
XII	3	106, 285
XII	4	101, 262, 299, 309
XII	5	241, 299, 309
XII	8	269
XII	9	262, 454
XII	10	243, 253, 262, 265
XII	13	262
XII	17	262, 265
XIII	3	183, 275
XVI	4	110, 178
XVI	14	95
XVI	15	172, 251, 257
XVIII	6	141
XVIII	7	141
XVIII	9	141
XIX		443
XIX	1	448
XIX	2	443, 448
XIX	3	443, 448

## REVISED GENERAL STATUTES OF 1920

Section	Page
683	261
1056	292
1057	292
1058	292
1059	292
1060	292
1061	292
1062	292
1063	292
1064	292
4185	482
5829	327

COMPILED GENERAL LAWS OF FLORIDA 1927  
AND SUPPLEMENTS OF 1936 AND 1940

312	157
1436	295
1537	210
1538	210
2099	306
4858	113
4867	113
5662	484
6124	482
6126 (Par. 14)	482
6145	482
6225	231



# SESSION LAWS

## ACTS OF 1856

	Page
Chapter 791	292
ACTS OF 1885	
Chapter 3629	193
ACTS OF 1891	
Chapter 4089	193
ACTS OF 1903	
Chapter 5222	473
ACTS OF 1905	
Chapter 5459	473
ACTS OF 1911	
Chapter 6195	295
ACTS OF 1913	
Chapter 6532, Section 20	339
Chapter 6736	193
Chapter 6737	193
ACTS OF 1917	
Chapter 7304	292
Chapter 7393	164
Chapter 7676	193
ACTS OF 1921	
Chapter 8537	292
Chapter 8537, Section 1	292
Chapter 8537, Section 9	292
ACTS OF 1923	
Chapter 7299	473
Chapter 9289	295
Chapter 9355, Section 3	124
ACTS OF 1925	
Chapter 10040, Section 1	196
Chapter 10096	458
Chapter 10123, Section 2	327
Chapter 10152	473
Chapter 10254	261
ACTS OF 1927	
Chapter 12002	117
Chapter 12012	284
Chapter 12022	498
Chapter 12290, Section 4	412, 413
Chapter 12295, Section 2	237
Chapter 12848	180
ACTS OF 1929	
Chapter 13576	482
Chapter 13622	180
Chapter 13702	298
Chapter 13761, Section 14	157
Chapter 14572, Section 1	196
Chapter 14573	284

	Page
<b>ACTS OF 1931</b>	
Chapter 14677 .....	459
Chapter 14678 .....	268
Chapter 14717, Section 51 .....	196
Chapter 14717, Section 62 .....	309
Chapter 14832 .....	436
Chapter 14899 .....	432
Chapter 15659, Section 1 .....	234
Chapter 15659, Section 18 .....	284
Chapter 15787, Section 1 .....	227
<b>ACTS OF 1933</b>	
Chapter 15920 .....	454
Chapter 15920, Section 5 .....	112
Chapter 15934 .....	184
Chapter 16178, Section 10 .....	339
Chapter 16252 .....	217
Chapter 16598, Section 2 .....	105
<b>ACTS OF 1935</b>	
Chapter 16774, Section 5 .....	444
Chapter 16789 .....	234
Chapter 16800 .....	421
Chapter 16800, Sections 12 and 14 .....	421
Chapter 16886 .....	184
Chapter 16954 .....	215
Chapter 16954, Section 2 .....	215
Chapter 17251 .....	261
Chapter 17400 .....	217
Chapter 17442, Sections 2 and 2½ .....	196
Chapter 17476 .....	230
<b>ACTS OF 1937</b>	
Chapter 17876 .....	209, 214
Chapter 17876, Sections 1 and 2 .....	209
Chapter 17902 .....	196
Chapter 17902, Section 11 .....	309
Chapter 18015, Section 12 .....	443
Chapter 18047 .....	306
Chapter 18133 .....	261
Chapter 18285, Section 18 .....	371
Chapter 18296 .....	195, 205, 217, 220
Chapter 18296, Section 9 .....	202
Chapter 18298 .....	234
Chapter 18396 .....	117, 189
Chapter 18396, Sections 2, 3, 4 and 7 .....	189
Chapter 18402 .....	385
Chapter 18402, Section 3 .....	385
Chapter 18404, Section 2 .....	285
Chapter 18413, Section 18 .....	396
Chapter 18676 .....	335
Chapter 18879 .....	214
<b>ACTS OF 1939</b>	
Chapter 19127 .....	214, 215
Chapter 19127, Section 1 .....	214, 215
Chapter 19127, Section 2 .....	215
Chapter 19211 .....	202
Chapter 19274 .....	173
Chapter 19274, Section 3 .....	173
Chapter 19274, Section 4 .....	302
Chapter 19274, Section 9 .....	173

	Page
Chapter 19276, Section 1	309
Chapter 19306	473
Chapter 19355, Section 439	264
Chapter 19355, Section 713	261
Chapter 19371	306
Chapter 19501	231
Chapter 19554, Section 23	316
Chapter 19600	275
Chapter 19611, Section 2	338
Chapter 19637	385
Chapter 19901	191
Chapter 19901, Section 11	191

## ACTS OF 1941

Chapter 20221, Sections 7 and 8	377
Chapter 20249, Section 1	377
Chapter 20263, Section 627.03	464
Chapter 20303	234
Chapter 20303, Section 1	322
Chapter 20327, Section 627.28	464
Chapter 20352	369
Chapter 20352, Section 1 (b)	369
Chapter 20356	437
Chapter 20356, Sections 2, 3 and 5	437
Chapter 20357	449
Chapter 20357, Section 2	450
Chapter 20451	317
Chapter 20455	508
Chapter 20455, Section 1	508
Chapter 20460	508
Chapter 20460, Section 10	508
Chapter 20477, Section 6	309
Chapter 20504, Section 5	360
Chapter 20512	213
Chapter 20523	163
Chapter 20578, Section 20	310
Chapter 20658, Sections 3, 4 and 5	210
Chapter 20658, Section 6	196
Chapter 20658, Section 8	309
Chapter 20658, Sections 10, 15 and 15 (i)	196
Chapter 20663	192
Chapter 20671	470
Chapter 20671, Section 9	470
Chapter 20714	371
Chapter 20716	369
Chapter 20718	164, 171, 255
Chapter 20718, Section 2	168
Chapter 20719	443
Chapter 20719, Sections 2 and 3	285
Chapter 20719, Section 5	413
Chapter 20722	218, 268
Chapter 20722, Section 1	196
Chapter 20722, Section 7	213
Chapter 20722, Section 15	211
Chapter 20722, Section 54	268
Chapter 20724	221
Chapter 20724, Section 33	221
Chapter 20733	449
Chapter 20733, Section 1	450
Chapter 20749	273

	Page
Chapter 20850 .....	153
Chapter 20852 .....	161
Chapter 20852, Sections 1, 2 and 3 .....	161
Chapter 20856 .....	472
Chapter 20856, Section 2 .....	472
Chapter 20863 .....	164, 171, 255
Chapter 20866, Section 1 .....	379
Chapter 20896 .....	369
Chapter 20914, Section 1 .....	271
Chapter 20917 .....	312
Chapter 20923 .....	337
Chapter 20936 .....	209, 214
Chapter 20943, Section 1 .....	119
Chapter 20954, Section 5 .....	484
Chapter 20955, Section 12 .....	396
Chapter 20956, Section 35 .....	230
Chapter 20970 .....	264
Chapter 20970, Section 3 .....	264
Chapter 20973 .....	302
Chapter 20980, Section 6 .....	343
Chapter 20981 .....	217
Chapter 21203 .....	476
Chapter 21203, Section 1 .....	476
Chapter 21368 .....	501

#### ACTS OF 1943

Chapter 21637 .....	192, 441
Chapter 21638 .....	238
Chapter 21652 .....	302
Chapter 21653 .....	302
Chapter 21659, Sections 1 and 2 .....	354
Chapter 21681 .....	134
Chapter 21684 .....	201, 220
Chapter 21684, Section 1 .....	296
Chapter 21690 .....	296
Chapter 21691 .....	181
Chapter 21691, Sections 3 and 4 .....	181
Chapter 21697 .....	377
Chapter 21702 .....	153
Chapter 21707, Section 4 .....	401
Chapter 21709 .....	432, 434
Chapter 21709, Section 1 .....	430
Chapter 21723 .....	101
Chapter 21742 .....	206
Chapter 21746 .....	484
Chapter 21759 .....	373
Chapter 21759, Section 1 .....	373
Chapter 21762, Section 3 .....	148
Chapter 21769 .....	403
Chapter 21769, Section 1, 2 and 3 .....	403
Chapter 21770 .....	122
Chapter 21774, Section 627.37 .....	464
Chapter 21775, Section 12 .....	506
Chapter 21779 .....	371
Chapter 21779, Section 1, Sub. (1-10) .....	371
Chapter 21781 .....	512
Chapter 21792 .....	404
Chapter 21820 .....	134, 154, 401



	Page
Chapter 21821	133
Chapter 21835	436, 438
Chapter 21836	436, 438
Chapter 21838	112, 134
Chapter 21839	446
Chapter 21839, Section 1	444
Chapter 21842	461
Chapter 21845	365, 472, 473
Chapter 21848	372, 373
Chapter 21851	140
Chapter 21876	197
Chapter 21885	408
Chapter 21893	181
Chapter 21913	404, 457
Chapter 21918	214
Chapter 21918, Section 2	214
Chapter 21921	204
Chapter 21943	221
Chapter 21943, Sections 1, 2, 3 and 4	221
Chapter 21945	328
Chapter 21946, Sections 14 and 17	230
Chapter 21948	121
Chapter 21948, Section 5	121
Chapter 21971	277, 280
Chapter 21971, Section 1	275
Chapter 21982, Section 4	382
Chapter 21983	381
Chapter 21989	267
Chapter 21996	398
Chapter 21996, Section 7	396
Chapter 21996, Section 12	447
Chapter 21997, Section 3	179
Chapter 22000	443
Chapter 22000, Sections 2 and 3	285
Chapter 22000, Section 7	310
Chapter 22018, Section 3A	152
Chapter 22034, Section 6	423
Chapter 22039	151
Chapter 22051, Section 2	113
Chapter 22062	277, 278, 280, 282
Chapter 22062, Section 2	275
Chapter 22071	303
Chapter 22071, Section 1 (16)	261
Chapter 22071, Section 1 (49)	284
Chapter 22071, Section 1 (57)	302
Chapter 22071, Section 4	359
Chapter 22071, Section 8	303, 304
Chapter 22071, Section 13	303
Chapter 22079	207, 267
Chapter 22079, Section 13	218
Chapter 22079, Section 21	220
Chapter 22079, Section 24	186, 207
Chapter 22079, Sections 36 and 44	220
Chapter 22118	128
Chapter 22263	161, 162
Chapter 22305	159
Chapter 22305, Section 6	159
Chapter 22307	149
Chapter 22384	501

## FLORIDA STATUTES, 1941

CHAPTER	PAGE
18	101
74	134
100	147
102	157
115	164, 170
125	180
129	136, 170
132	269
145	210
146	189
149	180
192	203
201	223, 225, 227
207	234
210	184
227	276
228	276
229	276
230	269, 276
231	276
232	276
233	261, 276
234	276
235	276
236	276
237	276
238	276, 283
249	289
284	304
285	304
293	306
294	306
321	317
322	317
341	321
384	354
394	365
398	367
412	275
415	373
458	346
459	346, 347
462	346
463	402
477	416, 418, 419
481	391
500	428
542	434
552	439
590	456
610	459
628	470, 471
632	471
638	473
649	478
653	100
655	482
735	274
742	503
743	447

CHAPTER	PAGE
744	306
937	502
947	118
948	510
952	512
954	512

SECTION	PAGE
1.01 (1)	150
2.01	125
6.04	91
8.01	156
8.02	156
8.04	156
11.13	140
16.19	146
16.20	285, 295, 302
16.21	285, 302
16.23	413
17.13	98
17.26	98, 373
18.01	104
18.10	100, 101, 103
18.11	100, 103
18.16	100
19.20	302
19.21	302
21.10	106
25.03	149
26.10	192, 441
26.49	336
27.02	108
27.23	109
27.27	109
27.29	109
28.06	110, 165
28.12	110
28.21	114
28.22	113
28.22 (6)	113
28.22 (11)	113
28.24	112, 113, 134, 454
28.52	111
30.23	118, 119, 121, 175
30.24	116
30.25	175
30.27	189, 332
32.06	122
32.17	122
38.18	123
32.19	123
32.26	336
34.01	428
34.07	336
34.12	123, 428
34.13	123, 428
34.14	123
36.01 (3)	125
36.01 (4)	125
36.02	125
36.11	336

Section	Page
36.12	306
36.18 (2)	128
37.01	126
37.03	126
37.16	129, 316, 336
37.20	119
37.21	130
37.24	126, 128
38.09	108, 126
38.11	108
39.23	383
40.24	130
40.25	130
41.08	130
43.03	134
43.04	122
45.02	492
54.04	132
54.05	132
54.06	100, 132
54.30	125
55.10	112
58.09	133
59.13	149
59.14	149
63.47	133
65.10	492
72.07-72.25	373
74.05	134
74.06	134
81.26	503
87.01-87.13	134, 154, 401
92.29	397
95.11 (5) (d)	228
98.01	144, 510
98.07	157
98.08	141
98.08 (2)	142
98.10	142
98.22	146
98.42	138, 146
98.43	93
98.47	142
99.04	137
99.10	147, 151, 157, 158, 160
99.19	148
99.36	148
99.39	137
99.48	259
99.57	148, 150
99.57 (2)	148
100.01	147
100.05	152
100.07	147
100.10	152
100.13	147
100.42	147, 152
101.11-101.19	138
102.01	156
102.02	151, 156, 157
102.05	151



Section	Page
102.06	422
102.07 (2)	156
102.07 (4)	156
102.16	147
102.21	145
102.27	140, 159
102.29	154, 155
102.31	140, 159
102.33	153, 155
102.38	152
102.39	152
102.48	151, 157, 158, 159, 160
102.57	149, 154
102.59	154
102.64	149
102.67	153
102.70	140
102.72	156
112.01	161
112.06	404, 457
112.08	161
112.09	161
112.10	161
113.01	162
113.04	165
113.07	163
115.03	165
115.08	168
115.09	168, 169, 170, 171, 255
115.10	164, 168, 169
115.11	164, 168
115.12	168
115.13	168
115.14	166, 168
115.15	168
116.01	422
116.07	111, 177
116.08	177
116.11	121
116.12	369
116.13	171, 512, 513
116.14	171, 512, 513
117.02	173
124.03	111
125.01	155, 180, 183
125.01 (4)	183
125.16	183
125.17	110, 111
125.23-125.25	456
125.26	179, 456
125.27	456
125.28	456
125.29	179, 456
125.30	456
128.01-128.08	111
129.01	111
129.03	170, 184
129.05	181, 184, 185, 268
129.06	207
130.12	323
135.01	175, 207

Section	Page
136.01	103, 186, 187
136.02	186, 187
142.01	175
142.09	188
142.10	188
144.01	119
145.01	214, 215
145.03	210
146.01-146.04	189
146.05	117, 189
146.06	189
146.07	189
167.43	338
167.72	199
171.04	193
192.04	206
192.06	206
192.06 (2)	196
192.06 (8)	195
192.16	197
192.17	197
192.19	198
192.21	196, 200
192.33	195
192.35-192.37	217, 220
192.38	201, 202, 217, 220, 296
192.38 (1) (a)	205
192.38 (1) (d)	205
192.39	217, 220
193.03	185, 207, 208, 267, 268
193.03 (4) (a)	267
193.03 (4) (d)	267
193.03 (4) (c)	267
193.04	217
193.05	217
193.11	338
193.32	338
193.50	213
193.51	200
193.52	214
193.56	211
193.65	209, 213, 214
193.65 (1)	212
193.65 (2)	212
193.66	209, 214
194.28	220
194.33	220
194.34	220
194.35	140
194.47	200, 218
194.55	220
196.17	204
198.38 (a)	204
199.06	214
201.02	225
201.04	227, 228
201.08	224, 225
204.07	228
205.01	338
205.02	338
205.12	228

Section	Page
205.13	230
205.16	230
205.17	233
205.32	231, 234
205.39	393
205.43	231, 232
205.69	403
208.01	234, 322
208.04	234, 322
208.05	234
208.11	234
208.44	234
210.02	223
210.14	230
210.17	236
215.01	238, 449
215.02	455
215.18	237, 238
215.20	236
215.26	417
215.27	434
224.22	501
227.13 (12)	253
227.13 (13)	253, 255
227.13 (24)	276
227.13 (25)	276
228.19	253
229.08	241
229.08 (6)	241
229.08 (10)	242
229.09 (20)	248
229.09 (21)	248
229.09 (22)	248
229.09 (23)	248
230.03	243
230.03 (1)	247
230.03 (2)	246, 253
230.03 (4)	253
230.04	95, 283
230.06	252
230.07	252
230.14	256
230.17	178
230.22	242
230.22 (1)	246, 253
230.22 (2)	246, 253
230.22 (5)	246, 253
230.23 (4)	249
230.23 (5)	248
230.23 (7)	253
230.23 (8) (d)	248
230.23 (9) (a)	248
230.23 (11) (b)	249
230.23 (12) (f)	246
230.23 (12) (g)	246
230.23 (12) (h)	246
230.23 (12) (i)	262
230.23 (13) (b)	255, 260
230.24 (16)	248
230.29	178
230.33 (12) (f)	246

Section	Page
230.34	253
230.35	243
230.36	243, 253
230.37	259
230.39	264
230.41	255
230.42	253
230.43	243, 253
231.28	258
231.40	258
231.50	271, 275
231.52	271
232.07	396
232.08	396
232.37	253
233.13	261
233.29	253
234.01	262
234.03 (1)	262
234.03 (3)	247
234.10 (1)	262
234.20	262
235.02	243
236.01	264
236.23	242
236.32 (2)	264
236.32 (2) (a)	259
236.32 (2) (f)	259
236.32 (3) (a)	263
236.32 (3) (b)	263
236.32 (4) (f)	264
236.32 (4) (g)	264
236.32 (4) (j)	264
236.53	212
237.02 (6)	262
237.09 (1)	269
237.18	212
237.22	267
237.23 (1)	262
237.23 (2)	262
237.25	265, 271
237.27	249, 265, 271
237.28	269
237.29	246
237.31	246
237.32	103
238.01	273
238.01 (4)	280, 281, 283
238.01 (16)	271
238.01 (18)	271
238.02	273
238.04	276
238.05	273, 275
238.05 (1) (b)	279
238.05 (2)	273
238.05 (3)	273, 277, 280
238.05 (4)	279
238.06	273, 281, 282
238.06 (2)	281
238.06 (3)	273



Section	Page
238.06 (5)	280
238.07 (1) (b)	275, 276
238.07 (2) (b)	271
238.07 (2) (c)	271
238.07 (3)	276
238.07 (5) (a)	276
238.07 (5) (c)	280
238.07 (6)	274
238.09 (1)	279
239.19	286
240.01	285
240.04	285
240.10	285
240.11	284, 285
240.21	247
240.22 (4)	247
240.23 (4)	247
242.01	257
242.09	178
249.04	289
249.06	289
249.10	289
249.26	148
253.03	294
253.12-253.15	292
253.42	292
253.45	295
253.47	295
264.03	296
264.04	296
264.06	296
264.08	296
264.15	296
270.07	299
270.09	299
270.11	292, 295, 299, 300
270.28	295, 304
271.01	292, 301
272.01	265
282.01	98, 241, 284
282.04	371
282.05	284
282.06	343
283.21	177
291.02	275, 306
291.07	306
293.01	306
293.03	484
294.01	306
294.07	306
294.11	306
298.11	106
298.51	106
298.65	106
310.10	314
317.20	310
319.08	311
319.15	387
319.16	312
319.19	312
320.01	316

Section	Page
320.03	215
320.04	214, 215
320.08	234
320.09	234
320.10	234, 287, 312, 313
320.38	315
320.76	311
321.01	317
321.01 (2)	317
321.05	316, 502
322.02	317
322.04	318
322.06	318
322.39	318
331.04	180
341.14	321
341.16	321
341.21	321
341.25	321
344.17	323
347.08	206
371.01 (11)	327
372.71	331
372.72	332
372.79	331
373.06	333, 338, 339
373.26	337
374.10	333
374.23	327, 337, 338
374.27	334
374.29	334, 339
374.30	338
374.41	327, 337
375.15	339
381.17	341
381.20	341, 354
381.49	175, 351, 354
381.50	175
382.21	353
382.22	353
384.04	349
384.05	354, 355
384.07	354, 355
384.08	349
384.09	354, 355
384.12	354
384.13	354
384.14	353
384.15	353
384.16	352, 353
384.17-384.19	353
386.01-386.09	357
391.01	370
393.02	303
394.05	303
394.10	362
394.20	361
394.21	359, 361
394.22	360, 361
394.24	361
394.25	361, 362

Section	Page
394.26	360, 361
394.27	359, 361
398.02 (1)	401
398.02 (5)	367
398.05	367
398.08	401
398.18	365
398.21	366
398.22	365
400.38 (5)	379
409.02	370, 372
409.03	369, 370
409.07-409.09	370
409.10	370, 371, 372
409.11-409.15	370
409.16	370, 372
409.17	370, 371
409.18	370
409.19	370
409.22	369
409.24	369
409.26	371
409.29	372, 373
409.30	372, 373
415.01	375
415.04	375
415.17	373, 375, 376
415.19	373
415.20	373, 375, 376
415.25	373
415.27	373
415.28	373, 376
421.03	377
421.04 (a) (b)	377
421.04 (9)	377
421.43	377
421.44	377
421.49	377
440.02 (1)	379
440.02 (4)	379
440.05	380
440.38 (1)	379
440.51 (1) (b)	232
440.51 (5)	232
443.03 (7) (a)	381
443.03 (7) (d)	381
443.08	383, 389
443.08 (3)	389
443.09 (1)	389
443.09 (3) (h)	389
443.11	383
443.12	383
443.12 (1)	383
443.12 (2)	383
443.12 (3)	383
443.12 (7)	382
443.15	383
443.15 (3) (a)	387
443.16 (2)	383
450.02-450.04	396
450.08	395, 396

Section	Page
450.08 (1) (a)	396
450.08 (1) (g)	396
450.08 (3) (c)	396
450.23	398, 447
456.03	400
456.10	399
457.08	346
457.91	401
458.09	346
458.13	346
459.07	346
459.09	346
459.13	347
461.01	401
462.05	401
462.11	401
462.18	401
463.08	402
463.18	404
463.19	404
464.04	404, 405
464.09	404
466.02	410
466.04	410
470.04	411
470.08	411
470.09	411
473.02 (1)	412
473.06	414
473.08	412, 413
473.25	412
477.01	421
477.02	421
477.02 (6)	420
477.03	421
477.04	421
477.05	421
477.06	421
477.06 (1)	421
477.06 (2) (h)	421
477.07	421
477.08	421
477.09	414, 421
477.10	421
477.11	421
477.12	415, 419, 420, 421
477.13-477.23	421
477.24	420, 421
477.25	421
477.26	421
477.27	418, 420, 421
478.07	422
478.08	422
480.03	418
480.06	423, 424
480.15	424
480.19	423
481.04	393
502.01	426
502.05	426
502.07	426



Section	Page
502.27	426
502.28	426
506.06	493
506.07	493
511.02	429
511.03	427, 429
511.04-511.07	429
511.08	427, 429
511.31	428
511.40	429
511.41	428
517.02	432
517.02 (1)	430
517.06	434
517.06 (5)	434
517.07	434
517.12	434
517.14	431
518.01	237
550.01-550.12	436
550.14	436
550.15	224, 436
550.16-550.25	436
550.30	184, 257, 434, 436, 437, 438
550.31	434
552.01	439
552.02	439
552.03	439
552.03 (3)	439
552.10	439
561.01	444, 446
561.34	441, 444
561.35	442
561.36	443
561.43	442
562.02	444
562.11	447
562.13	447
562.14	444, 446
562.44	445
568.10	445
585.01	452
585.08	449
585.14	449
585.32	238, 449, 450
585.34	452
585.43	449, 450
589.05	452
589.07	453
589.08	454
589.09	455
589.10	455
589.27	453
603.12	457
603.13	457
610.07	458, 459, 461
610.08	458, 459, 461
610.09-610.15	459
613.08	462
614.18	418
625.01 (8)	473

Section	Page
626.04	473
626.05	463, 473
626.06	473
627.03	464, 467, 468
627.04	467
627.05	465, 467
627.08	467
627.13	464
627.15	467
627.27	464
627.28	464
627.37	464
628.01	470
628.03	470
628.05	470
628.06	470
628.09	470
628.14	470
628.15	470
632.08	471
633.10	470
635.01	469
635.02	231
635.05	231
635.17	472
635.18	472
635.21	469
637.07	473
638.01	473
638.02	473
638.03	365, 472, 473
638.04	473
638.09	473
638.12	365, 472
638.14	473
640.17	476
649.04	478
649.10	478
649.11	478
653.10	100, 103, 480
653.86	103
655.10	481, 482
656.02	461
683.01	483
689.01	484
693.02	484
693.03	484
694.11	180
701.03	312
701.04	312
708.08	484
731.31	487
731.33	100, 101
731.34	484
732.44	274
734.29	274
741.04	376
741.06	488
741.07	488
743.03	395
744.02	375, 376

Section	Page
744.03	306
744.05	376
767.02	341
767.03	341
775.01	125
775.02	125
775.07	125
775.09	498
775.10	498
775.11	498
811.09	341
811.19	341
838.06	116
849.15	491
849.16	491
849.18	491
849.19	491
855.04	492
856.04	492
860.01	310
875.44	137
901.01	119, 126
901.02	189
901.09	189
901.23	126, 316, 495
902.01-902.18	126
902.19	126, 498
903.26	499
903.34	495
905.11	175
905.16	175
907.01	497
909.05	123
920.02	500
922.01	499
922.02	499
922.06	500
922.09	500
922.11	500
923.04-923.08	130
924.09	500
924.14	501
924.21	501
932.47	123
932.48	123
933.01	501
937.02	502
937.03	502
937.04	495
937.05	502
939.01	331
939.02	189
939.06	189
939.16	128, 503
941.10	508
947.16	506
949.07	508
949.07 (3)	508
950.05	175
951.07	125
952.01	175

Section	Page
952.02	175
952.06	175
954.22	116
954.35	303
954.36	513
954.39	513
954.49	512
955.05	303
955.20	375
955.21	375
955.22	375
956.02	376
956.07	303